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SUPREME COURT
STATE OF WASHINGTON

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No. 200, 302-8

BY C. J. HERRITT

SUPREME COURT
OF THE STATE OF WASHINGTON

IN RE:

BRADLEY R. MARSHALL,

Lawyer

WSBA NO. 15830

BRIEF OF APPELLANT MARSHALL

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A. INTRODUCTION

The Washington State Bar Association (Bar) seeks Bradley R. Marshall's disbarment because Marshall, in successfully representing fifteen Seattle and Tacoma longshoremen in a racial discrimination lawsuit against their union, maritime companies, and maritime trade associations, allegedly represented all the longshoremen despite potential conflicts in doing so, filed and prosecuted an appeal to the United States Court of Appeals for the Ninth Circuit without their approval, did not sufficiently account for proceeds of a settlement he achieved for them, and shared fees with a nonlawyer. Marshall denies the Bar's charges against him. The Bar's Disciplinary Board voted seven to six to sustain these allegations and chose to disbar Marshall, even though the Bar's hearing officer had recommended a two-year suspension.

The Bar did not sustain its high burden of proof on the charges against Marshall, an accomplished attorney known for taking difficult and controversial cases. Moreover, the Board made findings of fact on matters not raised in the Bar's charges, thereby denying Marshall his right to due process of law.

This case represents retaliation by three disgruntled clients against Marshall after he sued them for fees past due.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error

1. The Board erred in entering finding of fact 12.
2. The Board erred in entering finding of fact 13.
3. The Board erred in entering finding of fact 15.
4. The Board erred in entering finding of fact 18.
5. The Board erred in entering finding of fact 19.
6. The Board erred in entering finding of fact 20.
7. The Board erred in entering finding of fact 22.
8. The Board erred in entering finding of fact 23.
9. The Board erred in entering finding of fact 24.
10. The Board erred in entering finding of fact 26.
11. The Board erred in entering finding of fact 27.
- ~~12. The Board erred in entering finding of fact 28.~~
13. The Board erred in entering finding of fact 30.
14. The Board erred in entering finding of fact 31.
15. The Board erred in entering finding of fact 33.
16. The Board erred in entering finding of fact 34.
17. The Board erred in entering finding of fact 46.
18. The Board erred in entering finding of fact 50.
19. The Board erred in entering finding of fact 54.
20. The Board erred in entering finding of fact 60.

21. The Board erred in entering finding of fact 61.
22. The Board erred in entering finding of fact 62.
23. The Board erred in entering finding of fact 68.
24. The Board erred in entering finding of fact 69.
25. The Board erred in entering finding of fact 70.
26. The Board erred in entering finding of fact 72.
27. The Board erred in entering finding of fact 74.
28. The Board erred in entering finding of fact 76.
29. The Board erred in entering finding of fact 78.
30. The Board erred in entering finding of fact 79.
31. The Board erred in entering finding of fact 80.
32. The Board erred in entering finding of fact 84.
33. The Board erred in entering finding of fact 85.
34. The Board erred in entering finding of fact 86.
35. The Board erred in entering finding of fact 87.
36. The Board erred in entering finding of fact 88.
37. The Board erred in entering finding of fact 89.
38. The Board erred in entering finding of fact 90.
39. The Board erred in entering finding of fact 91.
40. The Board erred in entering finding of fact 92.
41. The Board erred in entering finding of fact 93.

42. The Board erred in recommending the sanction of disbarment.

43. The Hearing Examiner erred in ruling that evidence of a grievance Wayne Perryman filed against Mark Wheeler in a prior case was admissible only to impeach Wheeler and for no other purpose.

(2) Issues Pertaining to Assignments of Error

1. Did the hearing officer err in limiting the admission of evidence of a grievance Wayne Perryman filed against Mark Wheeler to impeachment purposes only? (Assignment of Error Number 43.)

2. Did the Disciplinary Board violate Bradley Marshall's right to due process of law when it made findings of fact and conclusions of law on issues not set forth in the Bar's amended complaint? (Assignments of Error Numbers 7, 8, 9, 26, 31.)

3. Did the Bar sustain its burden of proof that Marshall filed and prosecuted a successful appeal to the Ninth Circuit without his clients' knowledge or approval? (Assignments of Error Numbers 13, 14, 15, 16, 17, 18, 26, 32.)

4. Did the Bar sustain its burden of proof that Marshall charged the clients a fee in excess of his contingent fee agreement with them or paid unauthorized expenses? (Assignments of Error Numbers 19, 21, 23, 27, 33.)

5. Did the Bar sustain its burden of proof that Marshall had a conflict of interest in representing multiple longshoremen from different ILWU locals? (Assignments of Error Numbers 6, 9, 10, 11, 12, 24, 28, 33.)

6. Did the Bar sustain its burden of proof that Marshall did not adequately account to the clients for the settlement proceeds? (Assignments of Error Numbers 20, 27, 33.)

7. Did the Bar sustain its burden of proof that Marshall shared a fee with a nonlawyer? (Assignments of Error Numbers 1, 2, 3, 4, 5, 20, 25, 30, 31, 36, 37.)

8. Did the Disciplinary Board, on a vote of seven to six, properly decide to override the suspension recommendation of the hearing officer and disbar Marshall? (Assignments of Error Numbers 38, 39, 40, 41, 42.)

C. STATEMENT OF THE CASE

The Bar's claims arise from Marshall's representation of fifteen longshoremen¹ in a Title VII lawsuit, *Jefferies v. International Longshoremen and Warehousemen's Union, Local 98 et al.* (Cause No.

¹ The plaintiffs were Bennie Jefferies, Kim Farrison, Allen Webster, Robert Frazier, Douglas Woods, Michael Chambers, Rodney Rhymes, Mark Barnett, Terrell Rushing, Tracey Montgomery, Andrew Trinidad, Ruben Chavez, Allison Walker, Bruce Walker and Myron Woods. Of the fifteen longshoremen Marshall represented, only Chavez, Chambers, and Woods filed Bar complaints.

C96-6032FB) (“*Jefferies*”), against the International Longshoremen’s and Warehousemen’s Union (ILWU) locals, individual employers, and the Pacific Maritime Association (PMA) in which Marshall obtained an \$800,000 settlement for his longshoremen clients, plus promotions for several of them, and also negotiated changes in the dispatch and grievance systems to eliminate racism and nepotism and to expedite grievances.² Several law firms had previously refused to represent these clients. TR 239, 1463, 1714.

The *Jefferies* lawsuit began in December 1996, when Wayne Perryman, a nonlawyer, approached Mark Wheeler, an associate in Marshall’s law firm,³ about representing a group of longshoremen. TR 978. Perryman had a written agreement with the longshoremen to assist them in filing their U.S. Equal Employment Opportunity Commission (EEOC) complaints and obtaining right to sue letters. Bar Ex. 36; TR 1314. He approached Wheeler after the EEOC issued right to sue letters and the longshoremen directed him to find an attorney to represent them in

² One of the fifteen longshoremen opted out of the settlement.

³ The Board could not determine Wheeler’s relationship with Marshall. Finding of Fact 3. Wheeler was an associate in Marshall’s law firm in December 1996 and later became Marshall’s partner. TR 56. Wheeler had an office at the Marshall firm, came in regularly, and was on the firm’s stationery. TR 979-81. He had Marshall Law Firm business cards bearing his name. TR 993, 994. Later, it is clear he became a partner in the firm of Marshall, Wheeler, Zang and LaBorde. TR 56, 1262. Wheeler was very involved in the *Jefferies* case. TR 771, 772.

a civil rights action against the ILWU locals, the PMA, and certain individual employers. TR 554.

Shortly after Wheeler and Perryman met, the two of them met with the longshoremen. TR 981-82. At the time, the short statute of limitations on the longshoremen's civil rights action had nearly expired. TR 239-40, 999.⁴ Each longshoreman felt he had a claim against the ILWU and the PMA based on the denial of work, training, registration, and promotions within the longshore industry because of race. TR 222-24, 551-52, 567, 815-16. The longshoremen knew Wheeler intended to file a lawsuit and to enlist Marshall's assistance, and all agreed to this. TR 240, 242, 950.

In mid-December 1996, Wheeler, Marshall, and Perryman met to discuss the case. Bar Ex. 39. At that time or shortly thereafter, the three discussed Perryman's fee. TR 1000, 1002.

On December 18, 1996, a complaint was filed on behalf of twelve individual longshoremen in the United States District Court for the Western District of Washington.⁵ Wheeler, not Marshall, drafted the initial complaint, TR 58, and both Wheeler and Marshall signed it as co-

⁴ A Title VII claim has a six-month statute of limitations, and the longshoremen received their right to sue letters nearly six months earlier.

⁵ Three additional longshoremen were added as plaintiffs during the course of the litigation.

counsel. Bar Ex. 13. The complaint alleged the defendants committed acts of racial discrimination based on disparate treatment, disparate impact, racial harassment, retaliation, as well as other individual claims. The plaintiffs sought damages for lost past and future wages, emotional distress, out of pocket expenses, failure to promote to various levels (*unidentified* nonregistered casual, *identified* nonregistered casual, B and A)⁶ based on experience, failure to promote to foreman or crane operator, failure to train and register, and punitive damages. The complaint also sought institutional and structural changes in hiring, registration, certification, and dispatching procedures. TR 815, 916, 1027-30.⁷

⁶ An "A" registered person is a full-time longshoremen entitled to all union benefits such as medical, pension, etc., and first preference of jobs on a daily basis.

A "B" registered person is initially on a probationary status. This is a secondary status to "A" persons and comes with slightly less benefits. "B" persons have a second preference of jobs after "A" persons.

"Casuals" are not considered full-time or part-time employees. They are casual employees who are not registered and have no benefits. They pick up the extra work after the "A" and "B" people. "Casuals" are divided into two groups. First is the "identified" casual group. They have the opportunity for the next available work after the "A" and "B" groups. They also report out of the dispatch hall. Second is the "unidentified" casual group. They have opportunity for work after the "identified" casual group. They report out of the state unemployment office. TR 1282-85.

⁷ In 1985, the ILWU, representing several Pacific Coast longshore union locals, and the PMA, representing various employers, entered into negotiations resulting in a Pacific Coast-wide rule that created a class of casual employees called "identified" or "ID casuals." This new class was created, in part, to ensure that longshoremen could be counted on to show up on a regular basis and to avoid having people working at times one year, but not show up again for years. In order to qualify as an "ID casual," a person was required to work a minimum of 200 hours in a given year. The rule precluded the use of hours worked prior to 1985 for qualification as an "ID casual." This became a point of contention for some plaintiffs.

On January 9, 1997, Wheeler sent a letter to all the clients advising them the lawsuit had been filed and they would be responsible for paying costs. Marshall Ex. 5. The letter also advised of a meeting of all the clients set for January 16, 1997. *Id.* In the letter, Wheeler told the clients Perryman had been an invaluable consultant and had been retained as a consultant and an expert for the lawsuit. *Id.* Michael Chambers acknowledged receiving this letter. TR 246.

Wheeler, Marshall, and Perryman met with the clients on January 16, 1997 at Marshall's office. TR 250, 561. The meeting's agenda included review of information packets and discussion of each attorney's role, the 40% contingent fee agreement, how Perryman would be paid, and how much the clients were going to pay. Marshall Ex. 6. Chambers remembered getting a folder at the meeting, but did not recall any of the documents. TR 254, 255. Rodney Rhymes also recalled receiving the folders. TR 711. At the meeting, the clients signed written fee agreements. Bar Ex. 19; TR 256, 257, 631.⁸

At this meeting, the clients were also asked to provide information to assist in the presentation of their case. TR 1019, 1020. Each client provided his story to the attorneys in order to determine his claims and to

⁸ The fee agreement in the record, Bar Ex. 19, is the agreement Chavez signed. Each client signed the identical agreement. TR 1482-83.

allow the attorneys to evaluate him as a potential witness. TR 960, 1019. The clients also identified each of the individuals with whom they had problems and who were important witnesses to be deposed. TR 557. This type of meeting was typical of meetings held throughout the course of the litigation. TR 960, 1018-19.⁹

From the beginning of the case, the longshoremen made a pact among themselves that it was “all for one and one for all,” with everyone getting an equal share of any judgment or settlement. TR 786. Chambers testified: “[w]e decided as a group to stick together because we knew that the Seattle longshoremen case wasn’t that strong. And if we stick together as a group, we will – we’ll be – you know, strength is in numbers, so it’ll come out better.” TR 208. Chavez testified that from the start of the case, all the clients agreed everything would be decided by a majority vote. TR 592. Marshall obtained written, four-page conflict waivers from each of the clients. TR 195, 831-33, 1553-56.¹⁰

⁹ These periodic client meetings were often contentious, with clients yelling and talking loudly. TR 386-87, 794. Chambers did not have a problem yelling at Marshall if he felt it was necessary. TR 386. The clients were not bashful about speaking. TR 794.

¹⁰ Copies of all the waivers could not be produced because they were part of a group of records that had been inadvertently destroyed when Marshall moved his offices from one suite to another. TR 196. Apparently, someone involved in the move mistakenly thought the boxes containing these records were to be discarded. TR 125-28, 966. However, it would be anomalous for Marshall to have secured conflict waivers from only selected clients.

ILWU Local 98 moved for summary judgment. On April 27, 1998, Judge Franklin D. Burgess granted the motion, dismissing Local 98. Marshall told the plaintiffs an appeal from the summary judgment to the United States Court of Appeals for the Ninth Circuit was being prepared for filing. TR 75-76. None of the clients objected to the appeal until Chavez objected about a year and a half later just prior to issuance of the Ninth Circuit opinion. TR 75-76, 1741-42. Marshall filed the notices of appeal on May 26 and 27, 1998. TR 61, 63-64. Each plaintiff received a copy of the order on summary judgment, the notices of appeal, legal briefs, and correspondence on the appeal as it progressed. TR 59, 60, 74-75.

Jefferies went to trial on May 26, 1998. TR 66. Testimony was taken from May 26 through June 8, 1998. All of the clients were aware they had the right to opt out of the case and go to trial individually before Judge Burgess. TR 595. Only Bob Frazier opted out of the settlement. TR 590, 595.¹¹ After about ten days of trial and while the plaintiffs were in the process of putting on their case, Judge Burgess told both sides he

¹¹ At the time Frazier opted out, he had an offer of \$50,000 and a clerk's position from the defendants, which would have increased his salary by another \$50,000 per year. TR 773. He rejected the offer despite advice from Marshall to accept it. TR 773.

strongly believed the parties should try to settle the case through mediation. TR 583, 672, 1612.

Two settlement mediation sessions were held before United States Magistrate Judge Kelly Arnold, one lasting for three days. TR 1573-76.¹² During the mediation, Judge Arnold told the clients some of the claims were going to survive and some were not. TR 595. The clients determined to “stick it out together.” TR 271. At one point, Chavez left the mediation and told Marshall never to do another thing for him. TR 546. He was not happy with the settlement and left the courthouse; however, he later returned because of the longshoremen’s pact to accept whatever the majority wanted. TR 592, 607.

Chavez testified he got angry at Marshall at other times during the litigation and blew off steam. TR 612. Several of the plaintiffs likewise did this.¹³ *Id.* Just as Chavez did, however, these plaintiffs eventually returned and kept forging ahead. TR 612.

¹² Two sessions were held before retired King County Superior Court Judge Charles Burdell, one lasting two days, which proved unsuccessful. TR 1573-76.

¹³ Rhymes was disappointed the plaintiffs did not get to put on all of their case and blamed Marshall for this. TR 677, 678. Despite not being happy with how things went, however, when the case was settled, Rhymes told a reporter, “It was probably the best we could get the way things were going. . . . I think this lawsuit showed that there are some people with this union who were unafraid and willing to stand up for what they believe in. Hopefully this is a new beginning.” TR 684.

The parties reached a verbal settlement agreement on June 8, 1998. TR 66. The clients voted unanimously to accept the settlement. TR 1645. Judge Arnold explained to the plaintiffs they could opt out of the settlement, but none chose to do so. TR 1648. Judge Arnold also asked if anybody had objections to the settlement, and none of the plaintiffs raised any objection. TR 592-93.

On June 22, 1998, all of the clients, except Frazier, met with Marshall, Wheeler, Zaug, and Perryman to discuss the settlement. Marshall Ex. 53; TR 1122. The clients asked about how much they were going to receive and about their expenses. TR 1123. Because the plaintiffs had not received as much as they had hoped to receive in settlement, Marshall agreed to reduce his fee so each client would receive more money from the settlement. TR 1691-93.¹⁴

Judge Burgess approved the settlement on June 28, 1998. TR 592. Judge Burgess read the settlement into the record, and all the clients were there to hear it. TR 278, 592.

¹⁴ At the outset of their representation, because of the complexity of the lawsuit and the need to pay Perryman on an hourly basis for any work he performed on behalf of the firm regardless of the outcome, Marshall and Wheeler were unwilling to take the case on a 33 1/3% basis but instead charged 40%. Marshall, Wheeler, and Zaug testified there was no agreement to "split" the 40% fee with Perryman. TR 782, 1049-50, 1463-68. Marshall specifically told Perryman he could not share fees with him. TR 1161.

Perryman's testimony conflicted with that of Marshall, Wheeler, and Zaug. Perryman testified the firm normally charged 33 1/3%, but agreed to take a discount in this case and raise the fee to 40% and then give Perryman 10% of the fee. TR 1161-62.

The settlement agreement contained a provision giving each plaintiff the right to consult independent counsel to review the agreement. Marshall Ex. 58. By signing the agreement, the clients represented they either consulted with independent counsel or knowingly waived the right to do so. *Id.*

The fourteen longshoremen settled their lawsuit for \$800,000 plus promotions for several of them. Chambers was promoted to foreman by July 30, 1998; Woods was promoted to clerk by July 30, 1998; Rhymes was put on the crane list; and Chavez was promoted to the "A" list. TR 697. Also as a result of the settlement, the dispatch system was changed from subjective to rotational, so it could no longer be based on racism and nepotism. The grievance system was also revamped to significantly expedite grievances. Supervisors and workers were required to undergo sensitivity training. A training program was implemented so longshoremen would be able to work up and down the entire West Coast. TR 1539-46, 1643, 1651-52.

After the case settled, Marshall continued negotiations with the defendants regarding the non-monetary issues. Marshall communicated with the clients on the status of the non-monetary issues. Marshall Exs. 63, 67; TR 284-86. None of the clients participated in the post-settlement

meetings Marshall had with unions and employers to make changes to the system. TR 268, 578.¹⁵

Marshall distributed settlement accountings and distribution statements to the clients. Bar Ex. 30. The statements were prepared by the Marshall firm's bookkeeper, Mike Richards. TR 1708.

The accounting and settlement statement showed an initial settlement of \$780,000 with Marshall's contingent fee of 30%, or \$234,000. Bar Ex. 30. The accounting and settlement statement noted an additional recovery of \$20,000, for a total gross recovery of \$800,000. *Id.* No attorney fee was allocated to this additional amount; Marshall's fee was therefore *less* than 30% of the total settlement amount *Id.*

The accounting and settlement statement showed \$108,122.91 in costs, including payments to contract lawyers and a payment of \$71,459 to Perryman. *Id.*¹⁶ The statement also had attachments for both the costs and

¹⁵ Marshall worked on this phase of the case without additional compensation. The clients, having received the individual benefit of the settlement, were less interested in these systemic changes. TR 269, 578.

¹⁶ The Bar alleged certain expenses Marshall charged to the clients were improper. The Board ruled the Bar did not prove these allegations. The charges included \$450 for Marshall's trip from Los Angeles to Houston. Bar Ex. 32. Marshall flew to Houston on his way to Port Arthur to interview members of the ILWU local to determine if what was happening on the West Coast was consistent with what was happening in other regions of the country. TR 161, 162, 1559.

The Bar alleged the purchase of a tripod and video camera were inappropriate even though approximately fifty video depositions were taken of the clients and defense witnesses. TR 666, 667, 768. The clients agreed to Marshall's suggestion to purchase a video camera and a tripod in order to save money. TR 327, 780, 781, 806.

the Perryman expense. *Id.* The Perryman amount consisted of his fee of 10% of the recovery, as initially agreed to by the longshoremen, less a reduction of \$10,000 which Marshall persuaded Perryman to accept, plus \$1,459 in expenses. Bar Ex. 36; TR 1169.

One or two of the clients complained about payments to Perryman. TR 598. In fact, when the subject of paying Perryman arose, the “roof came off the office and everybody [was] yelling....” TR 599, 600. Chavez left the office at that point and did not hear the entire discussion. TR 606.¹⁷ The clients were reminded of their agreement to pay Perryman 10% of any recovery. Bar Ex. 36; TR 1123, 1124.

Perryman worked on the case before the complaint was filed and continued to work on the case after filing. Bar Ex. 39; TR 1013. Perryman’s deal with Marshall was that he would charge the law firm if it took over the case and paid him. In that event, the 10% agreement with the longshoremen would be nullified. However, if the firm chose *not* to compensate Perryman for the hours he had already put in, then the

The Bar complained about a donation to St. John’s Baptist Church in Tacoma where the clients met. The clients approved Marshall’s suggestion to donate \$100 to the church. TR 177-78; Bar Ex. 35.

¹⁷ Chavez conceded he knew before the settlement agreement was signed that Perryman would receive 10% pursuant to their written agreement. TR 596, 600. Chavez did not have a problem paying Perryman. TR 599. He was “paying him out of my pocket.” TR 599.

longshoremen would have to honor their 10% agreement. TR 1159, 1160. The expenses Perryman incurred before the case came to Marshall would be paid by the clients, but similar expenses he incurred while working for Marshall would be paid by Marshall. TR 146, 147. Wheeler testified Perryman charged the law firm on an hourly basis and the longshoremen on a percentage rate of 10%. He testified the firm had the same arrangement with Perryman in the *Collins* case,¹⁸ except the clients in *Collins* were charged 5%. TR 1116.

At the end of the case, Perryman submitted a billing to Marshall and Wheeler. Bar Ex. 38. He did so when Marshall asked him, at Wheeler's urging, to show his hours in order to justify his entitlement to 10%, or \$80,000 of the settlement. TR 1168.¹⁹ Perryman kept track of his hours in a running log. TR 1359. When Perryman presented the log to Wheeler and Marshall, he valued his services at \$200 per hour. Bar Ex. 39; TR 1157, 1158.

¹⁸ The *Collins* case alleged discrimination against foremen on the waterfront. This was handled by the Marshall firm beginning in 1999. TR 1266. In *Collins*, Perryman requested \$15,000 in fees. Wheeler and Marshall objected to this amount as excessive and representative of redundant billing. The matter went to court, and the court disallowed about \$7,000 of the fees Perryman requested, but nevertheless enforced Perryman's agreement with the clients. TR 1339, 1739.

¹⁹ Perryman testified he manipulated the numbers of hours he worked and arbitrarily chose his hourly rate to support his \$80,000 demand. TR 1168.

Marshall charged the clients for the fees of contract lawyers as expenses.²⁰ Also, the clients advanced Marshall \$41,000 for costs. He spent the funds, repaid the clients the full amount advanced, and charged the clients \$41,000 in expenses. TR 1194, 1406.

Only Chavez asked Marshall about the distribution of the settlement proceeds. On August 11, 1998, Marshall received a letter dated July 11, 1998 from Chavez requesting a copy of the retainer agreement and an itemized cost breakdown. Marshall Ex. 61. On August 19, 1998 Marshall wrote to Chavez, enclosing his final check and an itemized cost breakdown. Bar Ex. 65.²¹

By letter dated August 27, 1998, Chavez thanked Marshall for responses to his recent inquiries about the cost breakdown and expressed concerns about the accounting process. Bar Ex. 66.²² Chavez asked for a recalculation of expenses. *Id.* On August 28, 1998, Marshall sent a letter to Chavez acknowledging the August 27, 1998 letter and advising that he

²⁰ Between May 1997 and June 1998, Marshall charged the clients as expenses approximately \$9,473.75 he paid contract attorneys for work performed in the lawsuit. Finding of Fact 53.

²¹ The itemized breakdown Marshall provided to Chavez was similar to the one found at Bar Ex. 32. TR 442.

²² Chavez wrote, without explanation: "I can not understand why you feel a deposit is an expense??? In my limited abilities I have always thought that a deposit was a good thing and not an expense." Bar Ex. 66. The letter did not tie this statement to any particular item in the cost breakdown.

would respond when he returned from an out-of-state trial. Marshall Ex. 72.

Marshall wrote to Chavez on September 14, 1998, telling him the firm was unable to locate a copy of the retainer agreement because of a recent move. Bar Ex. 67. Marshall later located the fee agreement and sent a copy to Chavez. TR 435.

On January 5, 1999, Chavez wrote Marshall with questions about billing costs. Bar Ex. 68. Marshall wrote Chavez on January 20, 1999, advising that, pursuant to his request, the expense documentation had been gathered for his review and responding point-by-point to the issues raised in Chavez's letter. Bar Ex. 69.²³ On January 29, 1999 Chavez wrote Marshall thanking him for responding to his questions, asking for the fee agreement, asking about the video camera, and advising he would contact them as soon as possible to review the documents waiting at the firm's office. Bar Ex. 70.

²³ In the letter Marshall stated:

Again, we have retrieved all of the actual documentation that you have requested and are assembled here in our office for your review. You indicate in your letter that you have requested this information for the fourth time. Each time you have requested information we have expeditiously responded to your request. You are now requesting additional information and we are hereby providing the same.

Bar Ex. 69.

Although Marshall had gathered the documents, neither Chavez nor Tracy Bolvin, Chavez's girlfriend whom he later married, ever came to review them. TR 438. Bolvin testified she was too busy to do so. TR 442. Further, Chavez did not read many of the documents Marshall sent him after the settlement. TR 613.

Chavez claimed he terminated Marshall. However, from the time of the settlement in June 1998, there was no writing from Chavez to Marshall terminating his services even though the firm sent Chavez numerous documents and Chavez sent numerous letters to the firm during this period. TR 454. Bolvin asserted she faxed a letter to Marshall on June 30, 1999, stating Chavez was withdrawing from the *Jefferies* case. Bar Ex. 72. The June 30, 1999 letter, however, contains no fax imprint information, and no fax cover sheet accompanied it. Other faxes to Marshall from Chavez had such notations and cover sheets. *See, e.g.*, Bar Exs. 70, 73; Marshall Ex. 81. Marshall did not receive the June 30, 1999 faxed letter from Bolvin. Bar Ex. 86.

On October 12, 1999, Chavez sent a letter to Marshall informing him "your services are no longer required as of June of 1998" and requesting a copy of the settlement agreement. Bar Ex. 76.²⁴ In response,

²⁴ Presumably, if the June 30, 1999 letter had been sent there would be no need for this subsequent letter nor would there have been a need to refer to 1998 for the termination period.

Marshall wrote Chavez on October 18, 1999 enclosing a copy of the settlement agreement. Bar Ex. 77.

The settlement agreement dismissed all appeals as to settling parties, but since Local Union 98 was not a settling party, the appeal regarding that local was not dismissed. Bar Ex. 77.

On November 22, 1999, the Ninth Circuit issued an unpublished opinion reversing the summary judgment on the hostile work environment claims of Chavez, Chambers, Woods, and Montgomery against Local 98. The court affirmed the summary judgment on the hostile work environment claims as to the other plaintiffs and the discrimination-in-registration claims as to all the plaintiffs. A copy of the court's opinion is in the Appendix.

Marshall wrote to the four affected clients on December 1, 1999 regarding the result of the Ninth Circuit appeal. Bar Ex. 80. There is no evidence of a reply from any of the clients. On June 19, 2000, Marshall wrote the clients urging them to pursue their claims against Local 98, stating that since it was a contingent fee matter there would be no fee if the case was pursued and there was no recovery. Bar Ex. 83. Chavez did not reply to this letter.

On July 6, 2000, Marshall wrote to Chavez about the status of the case and advising, in the event the case was dropped, the firm would look

to him for fees for the value of the services rendered in pursuing the appeal. Bar Ex. 84. In apparent response to the letter, Chavez wrote Marshall on July 10, 2000 stating he (Chavez) had “withdrawn” from the case and no fee was owing because the fee agreement had been lost. Bar Ex. 85. Chavez included a copy of the June 30, 1999 letter, which had allegedly been previously sent to Marshall. Wheeler responded by sending a letter to Chavez on July 11, 2000, denying receipt of the June 30, 1999 letter, and discussing the fees which might be charged on the appeal. Bar Ex. 86.

When the clients who were parties to the Ninth Circuit appeal refused to pay for the services of the Marshall firm, the firm filed an action for recovery of its fees on the basis of quantum meruit. Bar Ex. 89.

The firm settled with the clients for \$8,000, and the parties executed a settlement agreement and release. Bar Ex. 90.

Following the filing of the complaint for collection of the unpaid fees for the firm’s successful handling of the Ninth Circuit appeal, Chavez, Chambers, and Woods filed Bar grievances against Marshall only. Bar Ex. 1.²⁵

²⁵ The Bar did not pursue discipline against Mark Wheeler. Wheeler is a hearing officer for the Bar. TR 1092.

The Bar filed its initial Statement of Charges against Marshall on October 21, 2002 and filed an amended statement on November 17, 2003. Bar Exs. 9, 11. The Bar made ten allegations of misconduct against Marshall.²⁶ The case was heard by hearing officer Robert Scales in December 2003 and March and April 2004.

During the hearing in December, Marshall asked Wheeler whether Perryman had filed a Bar complaint against Wheeler. TR 1095. Wheeler responded in the affirmative. *Id.* Counsel for the Bar objected to the question on the ground the information sought was not public information and was not admissible in the grievance proceeding against Marshall. TR 1096. The hearing officer allowed Marshall to question Wheeler about the Bar complaint Perryman filed against Wheeler, but issued a protective order to prevent the questions and responses from being publicly disclosed. TR 1104. Wheeler testified Perryman filed a Bar complaint against him in the *Collins* case, but the Bar dismissed the complaint. TR 1105-06. At the conclusion of Wheeler's testimony on this matter, the hearing officer lifted the protective order and ruled the testimony taken under the protective order could be used only for impeachment purposes. TR 1106.

²⁶ Count 10 arose out of a separate factual matter and was dismissed.

In March, the hearing officer revisited the issue of Wheeler's testimony to consider Marshall's objection to the limitation on the use of the testimony to impeachment purposes only and the Bar's objection to admitting the testimony for any purpose. Both sides presented argument, and the hearing officer affirmed his original ruling allowing the testimony to be taken, but admitting it only for purposes of impeachment. TR 1966-83.

After the Bar presented its case, two allegations were dismissed: Count I, alleging Marshall filed the *Jefferies* complaint without communicating with his clients at the time of filing and Count III, regarding failing to inform the clients Perryman had reduced his fee in their favor and charging the clients for the video camera, tripod, donation to the church, and the airline ticket.

The hearing officer entered finding of fact and conclusions of law. BF 149-72. The hearing officer recommended dismissal of two counts: Count VI, alleging Marshall negotiated an aggregate settlement without obtaining the informed consent of the clients, and Count X, alleging Marshall falsely stated under penalty of perjury he had no prior discipline imposed in the five years before signing a "Declaration of Supervising Lawyer."

The hearing officer dismissed parts of two counts: as to Count IV, he found the Bar failed to prove Marshall charged and/or took attorney fees in excess of the 40 percent agreed contingent fee, and although Marshall charged and/or took payment for the expenses he incurred in paying contract lawyers to work on the lawsuit, this act did not amount to a disciplinary violation since the fees could have been charged under the 40% contingent fee. As to Count IX, the hearing officer found the Bar failed to prove Marshall did not provide his clients with the benefit of the \$10,000 discount Perryman agreed to and charged his clients for personal expenses.

The hearing officer found violations as to six counts: Count II, regarding filing an appeal without the clients' permission, failing to abide by the clients' wishes regarding representation, and failing to inform them of the consequences of an appeal; Count IV regarding costs charged to the clients,²⁷ Count V, regarding representing multiple clients without explaining the implications of multiple representation or the advantages and risks involved, and failing to obtain waivers of conflicts; Count VII,

²⁷ There were no findings of fact to support this conclusion.

regarding failing to maintain complete receipt and disbursal records concerning the \$800,000 settlement and by failing to remit to his clients all money owed to them from the \$800,000 settlement proceeds; Count VIII, regarding sharing fees with a non-lawyer; and Count IX, regarding instructing Perryman to create an hourly invoice from Perryman's ten-percent fee. The hearing officer recommended a two-year suspension.

Marshall appealed the hearing officer's decision to the Bar's Disciplinary Board. The Board heard the case on April 1, 2005²⁸ and, in a seven to six decision, upheld the hearing officer's decision, but determined Marshall should be disbarred. The six-member dissent did not file an opinion explaining why they voted the way they did. The Board entered a number of findings that were different than those of the hearing officer.

See Board's Majority Opinion at 5, 11.

Marshall filed a timely appeal to this Court on the Board's decision.

D. SUMMARY OF ARGUMENT

²⁸ Marshall had a client matter that conflicted with the date the Board set for the hearing. The Board declined to accommodate Marshall's schedule. He missed most of the hearing. This was significant because Marshall examined many of the witnesses before the Bar's hearing officer. See TR 222-337, 383-91 (Michael Chambers), 409-82, 508-16 (Tracy Chavez), 492-99 (William LaBorde), 548-620, 623-24 (Ruben Chavez), 656-731 (Rodney Rhymes), 760-809, 812-24 (Justin Zaug), 847-942 (Bruce Walker), 977-1130, 1135-48 (Mark Wheeler), 1171, 1297-1367, 1378-85 (Wayne Perryman), 2031-89, 2091-94 (Lawrence Schwerin).

The Board abused its discretion in excluding evidence pertaining to the Bar's dismissal of a grievance against Wheeler filed by Perryman.

The Board made findings of fact on matters the Bar did not allege and used these findings as bases for its decision to disbar Marshall. This denied Marshall his right to due process of law.

The Board failed to sustain its burden of proving each act of Marshall's alleged misconduct by a clear preponderance of the evidence. As to the allegation that Marshall filed the Ninth Circuit appeal without his clients' consent, the record is replete with evidence of communications, both oral and written, by Marshall to the clients about the appeal, beginning at the time the court granted Local 98's motion for summary judgment and continuing through the court's denial of Local 98's petition for rehearing en banc after the court reversed in part the summary judgment. The only evidence of an objection to the appeal is evidence that Chavez voiced an objection about a year and a half after the notice of appeal was filed, just prior to the Ninth Circuit decision.

As to the allegation of the improper representation of multiple parties, again the evidence does not support the Board's determination. Notably, neither the Bar nor the Board identified Marshall's specific alleged conflict of interest in representing all the longshoremen. In fact, the record shows the longshoremen's interests were aligned in that they all

sought essentially the same remedies: financial compensation, promotion, registration, changes in the system, and an end to racial discrimination in the workplace. Marshall's belief that his representation of all the longshoremen would not negatively affect his representation of any individual client was both objectively and subjectively reasonable. Moreover, Marshall obtained signed conflict waivers from the clients at the outset of his representation.

The Bar likewise failed to prove by a clear preponderance of the evidence its allegations that Marshall split a fee with a nonlawyer. Perryman's contract with the plaintiffs to assist them in filing their claims with the EEOC in exchange for \$5,000 and 10% of any gross recovery was a valid and enforceable contract. Marshall committed no misconduct in effectuating this contract.

The allegation that Marshall improperly accounted for settlement proceeds is also not supported by the evidence. Marshall provided extensive documentation to the clients regarding disbursement of the settlement funds and complied with all the clients' subsequent requests to provide additional copies of this documentation and to make the documents available to the clients for inspection. Although the firm made an accounting error with regard to funds the clients advanced for costs, there is no evidence of fraud or intent to defraud in connection with the

accounting of the funds. The accounting error does not justify Marshall's disbarment.

Finally, under the circumstances of this case, the sanction of disbarment is extreme, disproportional, and not sustainable.

E. ARGUMENT

(1) Standard of Review for Board Decision

It must be presumed that a lawyer subject to disciplinary action has attained high morals and professional standards, has maintained those same standards, and "has performed his duty as an officer of the court in accordance with his oath." *In re Discipline of Little*, 40 Wn.2d 421, 430, 244 P.2d 255 (1952).

The Bar has the burden of proving an act of misconduct by a clear preponderance of the evidence. ELC 10.14; *see also In re Disciplinary Proceeding Against Allotta*, 109 Wn.2d 787, 792, 748 P.2d 628 (1988); *In re Disciplinary Proceeding Against Haskell*, 136 Wn.2d 300, 310, 962 P.2d 813 (1998). The Bar's burden is a heavy one:

"Clear preponderance" is an intermediate standard of proof in these cases, requiring greater certainty than "simple preponderance" but not to the extent required under "beyond reasonable doubt". This intermediate standard reflects the unique character of disciplinary proceedings. The standard of proof is higher than the simple preponderance normally required in civil actions because the stigma associated with disciplinary action is generally greater than that associated with most tort and contract

cases. Yet because the interests in protecting the public, maintaining confidence, and preserving the integrity of the legal profession also weigh heavily in these proceedings, the standard of proof is somewhat lower than the beyond reasonable doubt standard required in criminal prosecutions.

Allotta, 109 Wn.2d at 792.

Given the Bar's burden of proof is higher than the usual civil preponderance standard, this Court must alter its usual substantial evidence standard on review accordingly. *See, e.g., In re Sego*, 82 Wn.2d 736, 739, 513 P.2d 831 (1973) (where the burden of proof is clear, cogent, and convincing evidence, the appellate court must determine the evidence is "highly probable" to meet substantial evidence test). This is certainly in accord with this Court's determination that professional discipline is quasi-criminal in nature, *In re Kindschi*, 52 Wn.2d 8, 10-11, 319 P.2d 824 (1958) (medical discipline); *In re Disciplinary Proceeding Against Deming*, 108 Wn.2d 82, 103, 736 P.2d 639 (1987) (judicial discipline), and a professional's property and liberty interests in a professional license requires constitutional protection. *Nguyen v. State*, 144 Wn.2d 516, 522 n.4-5, 29 P.2d 689 (2001).

This Court must be certain the Board's findings are highly probable in order to sustain them.

(2) The Hearing Officer Erred by Limiting the Admissibility of Wheeler's Testimony about Perryman's Bar Complaint Against Him to Impeachment Purposes Only

The hearing officer erred by ruling Wheeler's testimony about the Bar complaint Perryman filed against him was admissible for impeachment purposes only. In so limiting the testimony, the hearing officer erroneously concluded there had to be a "compelling showing of relevance" because the testimony "arguably" fell under ELC 3.2 and was therefore confidential. TR 1974-75. A reading of ELC 3.2, together with ELC 3.1, shows the confidentiality afforded by ELC 3.2 goes to disclosure of the information to the public in general. ELC 3.2 does not confer a testimonial privilege such that Wheeler was shielded from having to testify as to Perryman's Bar complaint against him. The Bar provided no other basis for granting a testimonial privilege with respect to this information. Nor did the Bar provide any authority to justify requiring a "compelling showing of relevance" before the testimony can be admitted and limiting use of the testimony to impeachment purposes only.

Because Wheeler's testimony about Perryman's Bar complaint was not privileged, its admissibility is determined by whether it was relevant. *See* ER 402. As Marshall argued to the hearing examiner, the testimony

was admissible not only as evidence impeaching Wheeler's credibility,²⁹ but also as substantive evidence of the Bar's selectivity in whom it subjects to disciplinary proceedings.³⁰ If it was not an RPC violation for Wheeler to effectuate Perryman's agreement in *Collins*, it was similarly not a violation for Marshall to do so here. The hearing examiner's decision to limit use of the testimony to impeachment was error, and

²⁹ Counsel for Marshall argued:

We certainly think it still goes to the credibility of Mr. Wheeler because Mr. Wheeler is a person who the Bar dismissed a complaint against in the Collins matter. The Bar did not bring a complaint against him in this proceeding, even though his fingerprints are all over the whole process. Mr. Wheeler has been appointed a hearing officer in these proceedings. The cumulative effect of that goes to when you judge his credibility as to the things he said and things he did not say. We should be entitled in argument to argue that you get to weigh those matters in weighing what was both said and not said.

TR 1976.

³⁰ Counsel for Marshall argued:

Now, we believe that you should revisit your ruling that it can only be used to impeach, but instead to also allow it to come in as substantive evidence because it's our position that the Collins case matter, and then leading to where we left off with Mr. Marshall, go to part of a pattern in how these cases are charged and what's happening in these cases, which has to be applied against your weighing ultimately of the evidence in this case as to who the Bar chooses to charge, how they're charged, who is named, what the responsibilities are in connection with the case.

And in the Collins case, when combined with this one, is a part of an overall pattern, which we'll be arguing later. So we think it should be allowed to be used for argumentative purposes, as well, the fact that it exists, . . . not just for impeachment.

TR 1970-71.

deprived Marshall of the opportunity to advance a legitimate and compelling argument in his defense.

(3) The Board Violated Marshall's Right to Due Process in Issuing Findings of Fact as to Matters Not Contained in the Bar's Statement of Charges and Using These Findings as Bases for Its Decision to Disbar Marshall

The Board issued findings of fact as to matters not contained in the Bar's Statement of Charges and used these findings as bases for its decision to disbar Marshall. This violated Marshall's right to due process of law.

It is elemental to due process that a person accused of misconduct be apprised specifically of charges against him or her. *In re Disciplinary Proceeding Against Heard*, 136 Wn.2d 405, 442, 963 P.2d 818 (1998). In *In re Ruffalo*, 390 U.S. 544, 551, 88 S. Ct. 1222, 20 L.Ed.2d 117 (1968), the U. S. Supreme Court stated:

These are adversary proceedings of a quasi-criminal nature. *Cf. In re Gault*, 387 U.S. 1, 33, 87 S. Ct. 1428, 1446, 18 L.Ed.2d 527. The charge must be known before the proceedings commence. They become a trap when, after they are underway, the charges are amended on the basis of testimony of the accused. He can then be given no opportunity to expunge the earlier statements and start afresh.

The Bar did not allege Marshall knowingly violated RPC 1.2(a), 1.2(f), or 1.4(b) as to the Ninth Circuit appeal. Therefore, the Board should not have used this state of mind as an added factor for sanctions

against Marshall in violation of his due process rights. *See* Finding of Fact 72.

Additionally, even though the Bar did not allege Marshall used the claims of the Tacoma plaintiffs to bolster those of the Seattle plaintiffs, this became one of the bases of the Board's determination that Marshall improperly represented multiple plaintiffs without explaining the risks and benefits of doing so and without obtaining waivers. *See* Finding of Fact 23. Other bases for the Board's decision on this issue which the Bar did not allege are the allegations that Marshall did not meet separately with the plaintiffs to discuss their individual claims, Finding of Fact 22, and advised Chavez not to discuss the "tainted hours" issue in his deposition. Finding of Fact 24. Marshall was not apprised of these allegations against him and, because they became bases of the Board's decision, he was denied due process of law.

A fundamental tenet of due process is that the accused know of the charges he or she faces, and the sanctions attendant upon such charges. As a matter of due process of law, a lawyer has the right to be notified of clear and specific charges and to be afforded an opportunity to anticipate, prepare, and present a defense. *Romero*, 152 Wn.2d at 136. Also, a person facing charges of a criminal or quasi-criminal nature is entitled to know the nature and breadth of sanctions he or she is likely to face if a

tribunal sustains the charges. *State v. Rodriguez*, 78 Wn. App. 769, 771, 898 P.2d 871 (1995). Similarly, in the civil setting, a court violates a defendant's due process rights by entering a judgment in excess of the judgment sought in the complaint. In Washington, a judgment whose terms exceed the prayer in the complaint or similar pleading is void because the court lacks jurisdiction to enter such a judgment. To grant such relief without notice and the opportunity to be heard denies a party procedural due process. *In re Marriage of Leslie*, 112 Wn.2d 612, 617-18, 772 P.2d 1013 (1989). If a court awards relief other than or additional to that which was sought in the complaint, due process is violated. *Conner v. Universal Utils.*, 105 Wn.2d 168, 172-73, 712 P.2d 849 (1986); *Abbott Corp. v. Warren*, 56 Wn.2d 606, 609, 354 P.2d 926 (1960). This due process principle is rooted in notice. A party whose person or property is at risk must have notice of the jeopardy it faces from governmental action. *Ware v. Phillips*, 77 Wn.2d 879, 882, 468 P.2d 444 (1970). This is to protect the individual from the arbitrary exercise of government power. *State v. Cater's Motor Freight Sys.*, 27 Wn.2d 661, 667, 179 P.2d 496 (1947). The Board's issuance of findings of fact on matters not contained in the Bar's statement of charges violated Marshall's right to due process of law.

(4) The Board's Findings on Key Allegations Against Marshall Are Not Supported by Evidence That Was Highly Probable

The Board's findings against Marshall may be grouped into four general categories:

- (1) the Ninth Circuit appeal;
- (2) the treatment of, and accounting for, Marshall's fees and costs;
- (3) multiple client representation and conflict of interest; and
- (4) Wayne Perryman's fee.

The Board's findings on many of the key allegations relating to these issues are not supported by evidence that is highly probable.

(a) Ninth Circuit Appeal

In Count II of its Statement of Charges, the Bar alleged Marshall filed an appeal in the *Jefferies* case without his clients' permission, violating RPC 1.2(a), 1.2(f), and RPC 1.4(b).³¹ The Board sustained a

³¹ RPC 1.2(a) states:

(a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to sections (c), (d), and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter.

RPC 1.2(f) provides:

(f) A lawyer shall not willfully purport to act as a lawyer for any person without the authority of that person.

RPC 1.4(b) states:

determination the rules were violated. Finding of Fact 72. In specific, the Board found Chambers, Chavez, and Rhymes³² did not approve the Ninth Circuit appeal. Finding of Fact 30.

Washington law requires an attorney to give appropriate information about the legal courses of action available to a client. RPC 1.4. The client must then approve the course of action the attorney takes. RPC 1.2(a). However, the cases have not described in any detail exactly what amount of information satisfies either the requirement that information be provided to the client or that the client direct the attorney regarding the objectives of representation. *See, e.g., In re Disciplinary Proceeding Against Romero*, 152 Wn.2d 124, 94 P.3d 939 (2004); *In re Disciplinary Proceeding Against Cohen*, 149 Wn.2d 323, 67 P.3d 1086 (2003). In *Cohen*, in contrast with this case, the attorney neglected to respond to a summary judgment motion and the client's case was dismissed. The attorney appealed the dismissal, but neglected to advise the clients of the dismissal or the appeal. The attorney did not respond to

A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

³² Rhymes was not a party to the Local 98 appeal. He had nothing to with this count and should not have been included by the Board.

client inquiries about the status of the case and then billed the clients for the appeal necessitated by his neglect.

Here, Judge Burgess granted summary judgment in favor of Local 98, dismissing it from the case. Finding of Fact 29. Chambers remembers that at one of the client meetings, Marshall or one of the other lawyers announced that Judge Burgess had dismissed Local 98. TR 306-07. He further remembers there were discussions with the attorneys about the decision and the word “appeal” was used. TR 310-11. He remembers that at one point, in response to Judge Burgess throwing out parts of the case, Marshall said, “if he keeps doing this, I am going to file an appeal.” TR 390-91.

Marshall explained to his clients filing the appeal was the means of obtaining a reversal of Judge Burgess’ order and an appeal was going to be filed. TR 58-59, 1596-1604.³³ Marshall timely filed notices of appeal, thus preserving his clients’ rights of review. Bar Exs. 60, 95. At the time, the clients were aware Marshall intended to appeal the summary judgment, and none objected to that decision. TR 1742. Marshall sent copies of the notices of appeal to all the clients. TR 59, 62-63. Although

³³ On direct examination, Chavez, Rhymes, and Chambers testified they were not told in advance of the appeal. TR 214, 527, 644. However, Chambers *admitted* on cross-examination the plaintiffs were told Judge Burgess’ ruling was being appealed. TR 310-11.

he was not directly involved in the Local 98 appeal, Walker testified he received copies of both notices of appeal. TR 844-45, 848-49. If one of the *Jefferies* plaintiffs received the notices of appeal, it is reasonable to assume Chavez, Rhymes, Chambers, and the rest of the plaintiffs received the notices of appeal as well.

In addition to the appeal documents going to the plaintiffs from Marshall's office, many meetings were held between attorneys and clients at which the filing of the appeal was discussed. Marshall, Wheeler, Zaug, and LaBorde were all involved in those discussions. TR 59, 60.

After the notices of appeal were filed, Marshall explained in a letter to the clients the purpose of the appeal. Bar Ex. 61; TR 70. The letter congratulated each plaintiff for his victory in the successful settlement and discussed the Ninth Circuit appeal, stating: "the case against Local 98 is now pending before the 9th Circuit Court of Appeals. No matter what the outcome of that appeal" *Id.* Chambers and Rhymes admitted receiving the June 11, 1998 letter. TR 296, 645.

Marshall sent a letter on July 28, 1998 to all the plaintiffs discussing the Local 98 appeal, which stated in part, "[a]s you know, at this time we are still in the process of appealing Judge Burgess' ruling dismissing your case against Local 98." Marshall Ex. 79.

Marshall sent a letter dated December 1, 1999 to Chambers, Chavez, Woods, and Montgomery announcing their victory in the Ninth Circuit against Local 98 and requesting these and the other clients to meet at Marshall's office on December 7, 1999. Marshall Ex. 83.

Marshall also sent letters dated January 10, 1999 and January 24, 1999, referencing *Jefferies* to the Ninth Circuit Clerk, enclosing certain documents for filing. These letters were copied to the clients. Marshall Exs. 84, 85.

The Ninth Circuit denied Local 98's petition for rehearing en banc in March 2000. Marshall sent a letter dated March 30, 2000 to Chambers, Chavez, Woods, and Montgomery advising them of this decision and requesting a meeting on April 10, 2000 at Marshall's office. Marshall Ex. 86.

The appeal was essential to Marshall's overall strategy to obtain a good result from the ILWU. TR 1601-02. The appeal was successful and resulted in the reinstatement of four plaintiffs' claims against Local 98. TR 1599.³⁴

³⁴ In fact, Local 98 offered to settle the case with Chambers, Montgomery, Chavez, and Woods for \$10,000. TR 1732-33. Chavez apparently did not read the letter from Marshall and Wheeler informing him of the settlement offer. TR 530-31. The other plaintiffs refused the offer. Instead of receiving at least \$10,000 and paying Marshall and Wheeler 40% pursuant to the attorney fee agreement, these plaintiffs insisted the case be dismissed. TR 1734. Although it is impossible to know for certain the plaintiffs' motivation for insisting on dismissal, they may have not wanted to anger Local 98 any further. By this time, Chavez was on track to become an "A" man through Local 98 with

The Board's findings regarding the Local 98 appeal are not supported. Marshall's letters to the clients fully apprised them of all issues relating to the Ninth Circuit appeal. While the clients may not have read the letters, TR 260-62, 268-70, 613, or threw them away, TR 261-62, 298, 611-13, Marshall still met his obligation to inform the clients. In addition to the letters, the meetings with the clients were forums where the appeal was discussed and approved and where the clients had ample opportunities to ask questions and express concerns or objections. The Board erred in finding Marshall filed the appeal without his clients' consent.

(b) Common Representation of the Plaintiffs

The Bar alleged Marshall represented the clients without adequately explaining to them the risks and benefits of common representation and obtaining waivers from them in violation of RPC 1.7(b).³⁵ BF 33. The Board sustained this allegation. Finding of Fact 76.

much larger paychecks on the horizon, Woods had been promoted to clerk, making approximately \$50,000 per year more than he had been making before, and Chambers was promoted to foreman through Local 98, making approximately \$50,000 more per year than he had been making before. TR 2012-19. Chambers admitted the president of Local 98 pressured him to sign a document stating he was not involved in suing Local 98. TR 350. The Marshall firm moved to withdraw from the case and advised the clients either to accept the settlement or obtain new counsel and proceed with the case. TR 1734-35; Marshall Ex. 99.

³⁵ RPC 1.7(b):

An attorney should not represent multiple clients with potential or actual conflicting interests. *Eriks v. Denver*, 118 Wn.2d 451, 460, 824 P.2d 1207 (1992) (attorney represented both the promoters of a tax shelter scheme and investors in the scheme). In *Eriks*, a malpractice case, the conflict arose because the IRS denied the investor clients tax deductions, and they then asked the attorney if they had legal recourse against his promoter clients.

Similarly, in *In re Disciplinary Proceeding Against Egger*, 152 Wn.2d 393, 98 P.3d 477 (2004), this Court imposed discipline against an attorney who represented the lender in a transaction which involved a loan to a party in bankruptcy who would in turn make a payment to a firm client. This Court rejected the argument that the interests of both clients were aligned. *Id.*, 152 Wn.2d at 412. In *In re Disciplinary Proceeding Against McKean*, 148 Wn.2d 849, 64 P.3d 1226 (2003), this Court found an attorney violated RPC 1.7(b) when he arranged to loan an estate's

A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

- (1) The lawyer reasonably believes the representation will not be adversely affected; and
- (2) The client consents in writing after consultation and a full disclosure of the material facts (following authorization from the other client to make such a disclosure). When representation of multiple clients in a single matter is undertaken, the consultation shall include

funds to a company “in which he had a majority interest and which was in desperate need of financial support” without notice to the heirs. *Id.* at 868. Unlike the present case, the clients’ interests in those cases were dissimilar.

See also Marquardt v. Fein, 25 Wn. App. 651, 612 P.2d 378 (1980) (counsel for a class in a mortgage foreclosure action excluded for conflict where he was formerly an officer of the mortgagee); *Sayler v. Elberfeld Mfg. Co., Inc.*, 30 Wn. App. 955, 639 P.2d 785 (1982) (attorney represented both the manufacturer of a heavy duty boom and the manufacturer of the boom control device responsible for plaintiff’s injuries; attorney withdrew late in the case when it became clear one manufacturer would sue the other for contribution); *Gustafson v. City of Seattle*, 87 Wn. App. 298, 941 P.2d 701 (1997) (attorney represented both the driver/husband and the passenger/wife in an auto collision case; the court noted the driver and the passenger have potentially conflicting interests when they are involved in a collision); *Eugster v. City of Spokane*, 110 Wn. App. 212, 39 P.3d 380 (2002) (city attorney representing both the council in general and individual council members could present a conflict).

explanation of the implications of the common representation and the advantages and risks involved.

But see Halvorsen v. Halvorsen, 3 Wn. App. 827, 429 P.2d 161 (1970), *review denied*, 78 Wn.2d 996 (1971) (attorney represented both parties in a property division in an uncontested divorce; the attorney advised the parties of the conflict and advised independent counsel); *Stroud v. Beck*, 49 Wn. App. 279, 742 P.2d 735 (1987) (attorney was the escrow agent for a joint venture; the attorney had no duty to advise the joint venture members individually of the right to independent counsel).

Under RPC 1.7(b), the Bar had to prove by a clear preponderance of the evidence that Marshall represented one or more clients in a matter where “the representation of that client may be materially limited by the lawyer’s responsibilities to another client or to a third person, or by the lawyer’s own interests.” RPC 1.7(b).

The Bar failed to sustain this burden. Neither the Bar nor the Board identified Marshall’s alleged conflict of interest in representing the plaintiffs. In fact, the clients’ interests were aligned, regardless of whether they worked in Seattle or Tacoma. TR 245, 760-62, 785-86, 815, 1035-37.³⁶ *See Schneider v. Snyder's Foods, Inc.*, 116 Wn. App. 706, 709, 66

³⁶ The Bar failed to plead that the *Jefferies* plaintiffs were members of different locals. To the extent the hearing officer based his conclusion of law that Marshall had violated RPC 1.7(b) on this fact, Marshall’s due process rights were violated. *Heard*, 136 Wn.2d at 442; *Ruffalo*, 390 U.S. at 551. Further, as discussed above, one basis of the Board’s decision on this issue was its determination that Marshall used the claims of the Tacoma plaintiffs to bolster those of the Seattle plaintiffs. Finding of Fact 23. The Bar did not, however, allege this.

P.3d 640, 642 (2003) (the multiple plaintiffs were from as many as nine separate locals of the Teamsters union and sued their employer in a single lawsuit).³⁷ Each of the clients had been discriminated against by the defendants. All had claims for lost wages, lost benefits, lack of training, and lost promotions as a result of disparate treatment and/or disparate impact under state and federal civil rights statutes. Each plaintiff wanted the same basic remedies. Each all wanted financial contribution and registration, some wanted promotions from B bench to A bench, some wanted to become foremen, some wanted to become clerks, and some wanted to become crane operators. *See* Marshall Exs. 4, 20. All the clients wanted the implementation of objective promotion criteria. TR 1549. And, clearly, all wanted an end to the racial discrimination in the workplace. The clients came into the case as a group, agreeing to abide by the decision of the majority of them and agreeing to split any award equally among them. TR 1550-51. These clients' interests were aligned for purposes of the lawsuit.³⁸

³⁷ The district court had great latitude in consolidating or separating parties to a lawsuit. FRCP 20(b), 21. Here, the court did not separate the plaintiffs into individual lawsuits or into two separate groups consisting of Seattle longshoremen and Tacoma longshoremen.

³⁸ All but one of the five defense firms represented multiple clients and two of the firms represented as many as 100 maritime companies. Lawrence Schwerin testified about his multiple representation of several defendants. TR 2033-34.

Because Marshall's representation of each client was not materially limited by his representation of another client or of a third person nor limited by Marshall's own interests, there was no violation of RPC 1.7(b).³⁹

Further, Marshall complied with the second part of RPC 1.7(b) because he *reasonably believed* his representation of each plaintiff would not adversely affect his representation of any other individual client. TR 1548-49. In fact, Marshall reasonably believed the multiplicity of plaintiffs would positively affect his representation of the clients and the potential for a positive outcome in the case. TR 1551-53.

“‘Reasonable belief’ or ‘reasonably believes’ when used in reference to the Rules of Professional Conduct means the lawyer believes the matter in question and the circumstances are such that the belief is reasonable.” *RPC Terminology*. Thus, to be reasonable, a belief must be both subjectively and objectively reasonable. Here, Marshall's belief met this requirement.

With the investigation done within the time constraints allowed by the rapidly approaching statute of limitations, Wheeler and Marshall

³⁹ Further, this case would not have been filed if it had not been filed jointly. Individually, the amount each plaintiff stood to recover was not sufficient to justify 14 or 15 attorneys each going against the ILWU locals, the PMA, and several major

subjectively believed there was no conflict of interest among the plaintiffs. This belief, shared by Zaug and LaBorde, continued through the end of trial to the present day.

Marshall's belief was also subjectively reasonable. This case was filed with the intent to turn it into a class action. TR 189. But, class status was not obtained. Therefore, although the plaintiffs continued as multiple plaintiffs in a single lawsuit, all were suing the same defendants for basically the same reasons, with some variations for individual situations. From a subjective standpoint, Marshall's representation of the individual plaintiffs under these circumstances would not adversely affect his representation of any other individual plaintiff.

The Board noted there were arguments and conflicts among the plaintiffs. Finding of Fact 22. "Arguments" and "conflict" do not, however, equate to an ethical conflict of interest under RPC 1.7(b). Flaring tempers and rising voices do not create a conflict of interest. Trials are emotionally-charged events and many times emotions run high. This can and does spill over into outbursts and tense exchanges. That does not, however, create a conflict of interest, subjecting an attorney to

international maritime companies. The expenses of carrying this lawsuit forward for any one individual were prohibitive when compared to the likely recovery.

disciplinary action. Moreover, the conflicts were not between clients, but rather were of a more personal nature with counsel.

The Board also noted each plaintiff's case was discussed in roundtable fashion in front of all other plaintiffs. Finding of Fact 22. Assuming the clients did discuss their case in roundtable fashion with the permission of each client, this is not a conflict of interest.⁴⁰

The Board found Marshall advised Chavez not to discuss the "tainted hours" issue in his deposition in *Jefferies* because he was saving the issue for another lawsuit. Finding of Fact 24.⁴¹ In June 1998, Marshall filed a separate lawsuit involving the tainted hours issue and at least one of the *Jefferies* plaintiffs had a claim related to tainted hours. In fact, "tainted hours" were discussed frequently in the *Jefferies* case. Exs.

113, 121. There was no attempt to keep the "tainted hours" issue out of the case. Marshall testified about a series of cases starting with *Blanchfield* and including *Jefferies*, *Walls*, *Collins*, and others. TR 1265-71. Some were filed before *Jefferies*, and some were filed after. The common thread running through all of them was "tainted hours."

⁴⁰ The Board found Marshall did not meet separately with the plaintiffs to discuss their claims. Finding of Fact 22. As discussed, the Bar did not allege this in its Statement of Charges. Further, whether Marshall met individually or collectively with the clients does not create a conflict of interest.

⁴¹ Again, the Board did not allege this in the charges.

Everyone dealing with these cases—the union locals, associations, and companies--were aware of the “tainted hours” issue. It was no secret within the industry and it was no secret within legal circles dealing with these issues.

Finally, even though Marshall was certain there was no conflict, he nevertheless obtained conflict waivers from the clients. TR 194-95, 1554. Some of the clients recall signing waivers; some deny receiving or signing waivers; most are not sure what they received and what they signed. Walker recalled signing a waiver. TR 879, 884. Rhymes, Chambers, and Chavez were the only plaintiffs to deny signing a waiver. On cross-examination, Chavez testified he did not remember anything he signed, although he signed numerous documents. TR 753-54. It is difficult to believe that if some of the clients received and signed conflict waivers, all did not do so.

(c) Fee Splitting With Nonlawyer

The Bar alleged Marshall agreed to split his fee with Perryman, a nonlawyer, in violation of RPC 5.4(a),⁴² and the Board agreed. Finding of

⁴² RPC 5.4(a): A lawyer or law firm shall not share legal fees with a non-lawyer, except that:

(1) An agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

Fact 79. The Board also found Marshall violated RPC 8.4(c)⁴³ in allegedly creating an hourly invoice for Perryman. Finding of Fact 80.

The Board specifically found the longshoremen had a contract to pay 10% of any recovery to Consultants Confidential⁴⁴ for Perryman's aid in getting their case to the stage where a lawsuit could be filed. Finding of Fact 2. Such an agreement is enforceable. There was no fee splitting because the longshoremen paid Perryman for his contracted services pursuant to their agreement with him.

Under RPC 5.4(a), an attorney cannot share a fee with a nonlawyer. In *Luna v. Gillingham*, 57 Wn. App. 574, 789 P.2d 801 (1990), an attorney represented various clients on a contingent basis. When the clients prevailed in the case, the attorney sought a court-ordered fee award. The attorney requested \$20 per hour as the fee for a Rule 9 intern who originated the case and worked on it with the attorney. The

(2) A lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer; and

(3) A lawyer or law firm may include non-lawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

⁴³ RPC 8.4(c): It is professional misconduct for a lawyer to "[e]ngage in conduct involving dishonesty, fraud, deceit or misrepresentation."

⁴⁴ "Consultants Confidential" is not a corporation, but a sole proprietorship owned by Perryman. When Perryman executed the contract on behalf of Consultants Confidential as president, he was actually executing a contract on behalf of himself individually. Consultants Confidential and Perryman are interchangeable. TR 1157.

attorney later applied his contingent fee to the trial court's award plus the fee award. The attorney then agreed to split the fee with the Rule 9 intern. When the clients sued the attorney over his calculation of fees, the court held the court-ordered fees should not have been added to the gross recovery. The trial court also held the split with Rule 9 intern violated the predecessor to RPC 5.4(a), but the Court of Appeals declined to reach the issue of whether the ethical rule was violated. *See also In re Marriage of Estes*, 84 Wn. App. 586, 929 P.2d 500 (1997) (court overturned an attorney's dissolution decree which apportioned prospective contingent fees to him as assets, but did not assign any value to them; the court noted RPC 5.4(a) would not be violated if the wife received a share of the contingent fee in the property division).

Here, Marshall did not violate RPC 5.4(a) by simply effectuating a separate, written contract Perryman had with the clients. Under the contract, Perryman agreed to assist the clients in presenting their claims to the EEOC in exchange for \$5,000 and 10% of any gross recovery, plus pre-approved travel expenses. Bar Ex. 36.⁴⁵ EEOC regulations permit

⁴⁵ The Board recognized this in its findings:

In 1995, several longshoremen, including some of the longshoremen who became plaintiffs in the *Jeffries* [sic] case, signed an agreement to pay Consultants Confidential \$5,000 to prepare and present a class action lawsuit for consideration by the U.S. Department of Justice. They agreed to have Consultants Confidential act as their representative throughout the case until it was finally settled. They

“any person, agency, or organization” to file charges on behalf of any person claiming to be aggrieved. 29 C.F.R. § 1610.7(a).⁴⁶ Perryman’s agreement to present the plaintiffs’ claims to the EEOC in exchange for a specified payment was an enforceable contract. Marshall committed no misconduct in effectuating this contract.

Further, Perryman did not engage in the unauthorized practice of law by entering into this contract with the longshoremen. *See* RCW 2.48.180. He did not offer to provide services in a court of justice, he did not give legal advice, and he did not assist in the preparation of any legal instruments or contracts. *See Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 301-03, 45 P.3d 1068 (2002) (insurance adjuster engaged in unauthorized practice of law in violation of RCW 2.48.180 by advising the insureds to sign a release and assisting in its preparation). *See also Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 675 P.2d 193 (1983)

agreed to pay Consultants Confidential ten percent of the total final settlement as a fee for the consultant’s services plus pre-approved travel expenses associated with the case. Wayne Perryman, a non-lawyer, was the president of Consultants Confidential and he signed the contract.

Finding of Fact 2.

⁴⁶ Lay representation is permitted in other, similar situations. *See, e.g.*, WAC 263-12-020(3) (lay representation before the Board of Industrial Insurance Appeals); WAC 10-08-083 (lay representation in administrative hearings). *See also Unauthorized Practice of Law Comm. v. State*, 543 A.2d 662 (R.I. 1988) (employee assistants could aid injured employees in informal worker compensation hearings); *Unauthorized Practice of Law Comm. of the Supreme Court of Colorado v. Employers Unity Inc.*, 716 P.2d 460

(laypersons selecting and drafting escrow instructions, promissory notes, and warranty deeds engaged in unauthorized practice of law); *Wash. State Bar Ass'n v. Great Western Union Fed. Svcs. & Loan Ass'n*, 91 Wn.2d 48, 586 P.2d 870 (1978) (real estate closings by nonlawyers constituted unauthorized practice of law); *In re Disciplinary Proceedings Against Droker & Mulholland*, 59 Wn.2d 707, 370 P.2d 242 (1962) (attorneys who were escrow company officers disciplined for allowing nonlawyer employees to perform legal services associated with real estate closings). *See also Tegman v. Accident & Med. Investigations, Inc.*, 107 Wn. App. 868, 30 P.3d 8 (2001) (paralegal who handled accident claims on contingent basis, preparing legal pleadings and settling claims, engaged in unauthorized practice); *State v. Hunt*, 75 Wn. App. 795, 880 P.2d 96 (1994) (paralegal who drafted pleadings and made court appearances prosecuted for unauthorized practice of law). *But see Perkins v. CTX Mortgage Co.*, 137 Wn.2d 93, 969 P.2d 93 (1999) (mortgage lender engaged in authorized practice by selecting and preparing home loan documents, but its employees did not do so by filling out forms); *Cultum v. Heritage House Realtors, Inc.*, 103 Wn.2d 623, 694 P.2d 630 (1985) (preparing earnest money agreements was the practice of law but

(Colo. 1986) (lay representation of employers or employees in worker compensation cases permitted).

authorized real estate brokers and agents authorized to do so without charge).

Further evidence of the enforceability of Perryman's contract with the *Jefferies* plaintiffs is the fact that a similar contract was enforced in *Collins*, in which Perryman had the same arrangement with the clients, except the clients in *Collins* agreed to pay Perryman only 5% of any recovery.⁴⁷ TR 1266, 1739-41. Perryman sued Marshall for fees under his contract with the *Collins* plaintiffs, indicating he may have harbored lingering resentment against Marshall.⁴⁸ Although the court found the fees Perryman requested were excessive by about \$7,000, the court nevertheless enforced the contract and awarded a reduced amount of fees. TR 1339, 1739. If the contract in *Collins* was enforceable, then the essentially identical contract at issue here is likewise enforceable.

Marshall testified he and Wheeler accepted the case with the understanding from the clients that they had signed an agreement with

⁴⁷ Perryman's testimony shows the agreements in the two cases were substantially identical. He testified about a letter he wrote to Marshall regarding *Collins* in which he stated: "For my services to your firm Marshall and Wheeler *you proposed to pay me the same as you did in the Jefferies case*, \$200 an hour for all work specifically ordered by your firm such as preparation for depositions as an expert witness, filing new EEOC claims and reviewing transcripts. For my past and continued services on behalf of the plaintiffs, *they agree to pay me 5% of their recovery if there is any.*" (Emphasis added.) TR 1345.

⁴⁸ Perryman denied any animosity or anger over Marshall's refusal to pay his excessive request for fees and the court's substantially reduced fee award. However,

Perryman for 10% of their recovery. TR 1462. Marshall agreed to hire Perryman as a consultant and possibly as an expert witness, and agreed to be responsible for his fees for work as a consultant and expert regardless of whether the case resulted in any recovery. TR 1463. Because he was shouldering this responsibility, and because of the complexity of the lawsuit and the tremendous amount of pretrial work that would have to be done, Marshall was not willing to take the case on a 33 1/3% basis, but instead charged 40%. TR 1463. At the initial meeting with the clients, Marshall and Wheeler explained that one of the reasons for the 40% fee was the agreement to pay Perryman for work he was to do for the firm even if there was no recovery. TR 1479.

Perryman falsely testified Marshall said although the firm normally charged 33 1/3%, it would take a discount and raise the fee to 40% and then give 10% of the fee to Perryman. TR 1161, 1162. Perryman also falsely testified he was deposed in the *Jefferies* case and in connection with that deposition Marshall allegedly cautioned him not to talk about the fee arrangement. TR 1163-65. Perryman was not deposed in the *Jefferies* case, something he admitted only when reminded of this by the Bar's

Perryman's responses during the hearing were indeed angry and vindictive. See TR 1337-40.

attorney in the interim between the first days of the hearing in December 2003 and the later days of the hearing in March 2004. TR 1299, 1312.

At other points as well, Perryman contradicted himself during his testimony and testified falsely. Perryman first agreed nobody told him not to testify about the fee, but he then later said he had been told. TR 1313, 1370-71. Perryman testified Marshall asked him to reduce his fee, but then falsely testified Marshall's request came after Perryman had already been paid his first payment. TR 1169. In fact, the reduction was agreed to and shown on the initial accounting prepared and presented to the clients at the settlement meeting on June 17, 1998, well before the first payments, which were sent out on July 6, 1998. Bar Ex. 30. Perryman also falsely testified when asked if he had ever told anyone in the *Thompson* case his hourly rate was \$200 per hour. He denied that he had done this, but he was then confronted with his sworn testimony in a deposition that he had in fact stated this. TR 1329.

Marshall denied an agreement to "split" the 40% fee with Perryman. TR 1463-68. Similarly, Wheeler and Zaug vehemently denied any fee splitting with Perryman, TR 782, 1049-50. Wheeler also denied discussing fee splitting with Perryman. TR 1049-50.

Perryman falsely testified that Marshall agreed to split his and Wheeler's fees with Perryman. TR 1161-62. Perryman also testified Wheeler was present when he claims Marshall agreed to a split. TR 1154.

In the end, the allegation of a fee split between Marshall and Perryman makes no sense where Perryman's agreement with the longshoremen was enforceable. He was entitled to \$80,000. Marshall prevailed upon him to accept a lesser fee. There is no evidence of any additional fee than the \$70,000 being paid to Perryman.

The Bar did not sustain its burden of proving by a clear preponderance of the evidence Marshall split fees with Perryman.

(d) Accounting for the Settlement Proceeds

The Bar alleged and the Board found Marshall did not properly account for the settlement proceeds to the clients and failed to account for \$41,000 the plaintiffs paid to Marshall for litigation expenses. The Board found Marshall violated RPC 1.5(a)⁴⁹ and RPC 1.14(b)(3) and (4).⁵⁰ Findings of Fact 74, 78.

⁴⁹ RPC 1.5(a): A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, the skill requisite to perform the legal service properly and the terms of the fee agreement between the lawyer and client;

An attorney is obliged to keep client funds in appropriate and identifiable accounts, RPC 1.14(a), and to maintain records of client funds coming into the attorney's possession. RPC 1.14(b)(3). The attorney must also account to the client for the funds received. RPC 1.14(b)(3), 1.5(c)(1). The failure to account to a client for funds received will subject an attorney to discipline. *In re Disciplinary Proceedings Against Burtch*, 112 Wn.2d 19, 22, 770 P.2d 174 (1989); *In re Disciplinary Proceedings Against Schwimmer*, 153 Wn.2d 752, 108 P.3d 761 (2005).

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- (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
 - (3) The fee customarily charged in the locality for similar legal services;
 - (4) The amount involved in the matter on which legal services are rendered and the results obtained;
 - (5) The time limitations imposed by the client or by the circumstances;
 - (6) The nature and length of the professional relationship with the client;
 - (7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and
 - (8) Whether the fee agreement or confirming writing demonstrates that the client had received a reasonable and fair disclosure of material elements of the fee agreement and of the lawyer's billing practices.

⁵⁰ RPC 1.14(b)(3) and (4): "A lawyer shall:

...

- (3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to his or her client regarding them;
- (4) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

However, the cases addressing such a failure to preserve and account for clients funds most often involve either an attorney's complete refusal to account for client funds (*Burtch, Schwimmer*) or an attorney's manipulation of client funds for an ulterior purpose. See, e.g., *In re Disciplinary Proceeding Against Tasker*, 141 Wn.2d 557, 9 P.3d 822 (2000) (attorney commingled personal funds with trust funds to avoid garnishment for past due child support); *In re Disciplinary Proceeding Against Petersen*, 120 Wn.2d 833, 846 P.2d 1330 (1993) (attorney placed County funds intended for payment of criminal defense expert witnesses into a trust to convert the funds for his own use). The cases do not describe the situation here – an attorney, who fully accounted to the clients for the sums at issue and who unintentionally made accounting errors with no intent whatsoever to defraud the clients.

Marshall properly kept records of settlement funds received and properly accounted to the clients for their disbursement. Marshall maintained complete receipt and disbursal records concerning the settlement.⁵¹ He gave the clients settlement accountings and distribution statements prepared by his bookkeeper, Mike Richards. TR 1289-92.

⁵¹ That Marshall lost some documents in his office move does not equate to an ethical violation, as Dennis Wintch testified. TR 1449-52.

Marshall also responded properly to Chavez's requests for documentation of expenses.⁵² See Bar Ex. 61 (letter from Marshall to Chavez enclosing his final check and responding to Chavez's request for a detailed itemized cost breakdown); Bar Ex. 69 (letter from Marshall to Chavez in response to Chavez's further requests for documentation, stating the expense documentation had been gathered for his review and responding point-by-point to the issues Chavez raised); TR 435 (Marshall located a copy of the fee agreement and sent it to Chavez); Marshall Ex. 78 (letter from Marshall to Chavez responding to Chavez's additional request for documentation and inviting Chavez to the office to review the expense documentation). Marshall made available the documents Chavez asked to examine. Chavez simply failed make any attempt to come to Marshall's office to examine them. Further, Chavez did not read all the documents Marshall sent him after the settlement. TR 613.

Julie Mass, the Bar's auditor, generated a series of reports dealing with the settlement funds. She was able to do so based on the client billing worksheet and settlement documents Marshall provided. Bar Exs. 30, 32. She later received various checks, bank statements, and deposit records. These were all consistent with the records Marshall provided. TR 1185-89. She never found any information indicating the payment and

⁵² Chavez was the only plaintiff who requested such documentation.

disbursal records reflected in the client worksheet were not an accurate record of Marshall's payments and disbursements of the settlement funds. TR 1207, 1208.

Mass' analysis started with the \$800,000 settlement amount and then applied a 30% attorney fee and a 10% fee to Perryman. Because Perryman agreed to reduce his \$80,000 fee to \$70,000, Mass added back in the Perryman reduction \$10,000.⁵³ On this basis she calculated a settlement, less fees and before deductions for costs, of \$490,000. She then deducted costs of \$58,236.13 as she calculated them. This left, by her calculations, \$431,763.87 due the clients. She then calculated that the clients received \$381,418.09 with a balance due of \$50,345.78. Bar Ex. 26B; TR 1200-04. Mass assumed a 30% contingency fee, not a 40% contingency fee, to which Marshall was contractually entitled, in arriving at what she claims is \$50,345.78 due to the clients. Because the hearing officer found Marshall was entitled to 40%, BF 164, the amount determined by Mass was incorrect. Further, the amount Mass identified as Marshall's attorney fees of 30% was not the amount actually received. Marshall's accountings to the clients showed a fee of \$234,000, which is

⁵³ Mass' calculations were based on information the Bar gave her. She had no independent information about the fee agreement and had never discussed it with Marshall. TR 1205-06.

\$6,000 less than the 30% fee allocated by the Bar. TR 1213, 1214. Bar Exs. 26B, 30.

The Bar failed to prove by a clear preponderance of the evidence that Marshall did not properly account to the clients for the settlement proceeds.

The Board also found Marshall improperly accounted for \$41,000 the clients advanced as costs. Finding of Fact 56. Marshall expended the funds, repaid the clients, and charged the \$41,000 as an expense. TR 1406.

Mass agreed the arrangement was unusual since the clients were to be paid back the funds. She stated, under Marshall's accounting system, the funds from the clients were treated as a loan, or as an expense to be paid back at the end of the case. TR 1218-20. Mass concluded the \$41,000 should have been treated as an advance fee deposit. TR 1215.

Dennis Wintch, the CPA Marshall called to testify on the accounting issues, had extensive experience in fraud investigations, TR 1399, 1340; Marshall Ex. 131. Wintch testified Marshall believed in good faith the \$41,000 was an expense to be paid by the clients just as any other payments should be reflected as cost to the clients. TR 1406. Wintch testified he has had many clients who held the same view in similar circumstances. TR 1406-09. He ultimately determined Mass was correct

in concluding \$41,000 paid by the clients into Marshall's trust account should have been treated as deposit and not a cost. TR 1411. Wintch testified Marshall's accounting documents reflected an accounting error, but the error was not intentional and the charge of \$41,000 in expense was made with no intent to defraud the clients. TR 1431, 1433. Although Marshall made an accounting mistake in not charging the \$41,000 as a cost, the mistake was not done knowingly, intentionally, or with an intent to defraud and does not, as discussed below, support the sanction of disbarment.

(5) The Board's Recommendation to Disbar Marshall Is Not Sustainable

The Bar's hearing officer recommended a two-year suspension of Bradley Marshall and restitution. BF 170. On a seven to six vote, the Board increased the sanction to disbarment. Board's Majority Opinion at 16. Where the Board splits on a sanction recommendation, this Court gives less deference to a Board recommendation. *In re Disciplinary Proceeding Against Whitt*, 149 Wn.2d 707, 723, 72 P.3d 173 (2003); *In re Disciplinary Proceeding Against Vanderbeek*, 153 Wn.2d 64, 97, 101 P.3d 88 (2004). The Board's decision here is not supported on this record.

This Court is not bound by the Board's recommendations on sanctions, as it retains the ultimate responsibility for determining the

proper sanction to be applied against an attorney. *In re Disciplinary Proceeding Against Longacre*, ____ Wn.2d ____, 122 P.3d 710 (2005); *In re Disciplinary Proceeding Against McLeod*, 104 Wn.2d 859, 865, 711 P.2d 310 (1985). The Supreme Court is “the definitive authority for bar disciplinary cases in Washington.” *In re Disciplinary Proceeding Against Kuvara*, 149 Wn.2d 237, 246, 66 P.3d 1057 (2003); *In the Disciplinary Proceedings Against Hankin*, 116 Wn.2d 293, 295, 804 P.2d 30 (1991). The Board does, however, give “serious consideration” to the Board’s recommendations. *McLeod*, 104 Wn.2d at 865.

This Court engages in a two-step process in determining the propriety of a sanction against an attorney and utilizes the ABA Standards for Imposing Lawyer Sanctions in doing so. “First, the presumptive sanction is determined by considering: (1) the ethical duty violated, (2) the lawyer’s mental state, and (3) the extent of the actual or potential harm caused by the misconduct. Second, the court considers any aggravating or mitigating factors that may alter the presumptive sanction or affect the duration of a suspension.” *Longacre*, ____ Wn.2d ____, 122 P.3d at 719.

Using the Court’s analytical framework for addressing sanctions in attorney discipline cases, the Court should reject the excessive sanction imposed by the Board against Marshall.

First, looking to ethical duties Marshall allegedly violated, the overwhelming majority of those violations merit neither suspension nor disbarment. Under the ABA Sanctions Standards the following Standards might be applicable in this instance 4.13, 4.14, 4.33, 4.34, 4.43, 4.44, 4.63, 4.64, 7.3, and 7.4. All of these Standards call for a reprimand or admonition.

Second, looking to the issue of Marshall's state of mind, the Board erred in determining Marshall acted intentionally. If there was misconduct in this matter, it was the result of a negligent state of mind and was not intentionally or knowingly done. Notably, *the Bar in its formal complaint did not allege Marshall acted knowingly or intentionally*. BF 1-9. The hearing officer found Marshall acted knowingly. BF 149-72. The Board, ~~however, found Marshall acted intentionally, rather than knowingly, with~~ respect to the allegations of fee-splitting with Perryman and instructing Perryman to create an hourly invoice for his 10% fee. Findings of Fact 79, 80. These are the only two allegations of misconduct for which the ABA Standards recommend disbarment when the lawyer knowingly engages in the conduct at issue. *See* Findings of Fact 88, 89 (discussing ABA Standard 7.1).

Because the Bar did not allege Marshall acted knowingly or intentionally with respect to the alleged misconduct, Marshall was not

apprised that disbarment was a potential sanction for the alleged misconduct. He had no opportunity to prepare a defense to the charge. By deciding to disbar Marshall for alleged misconduct he was claimed to have committed knowingly or intentionally, without affording him notice of these allegations and an opportunity to defend them, the Board deprived Marshall of his right to due process of law. *See* section (3), *supra*.

Moreover, the record does not support the Board's determination that Marshall acted knowingly or intentionally. For example, Dennis Wintch, the accountant, testified Marshall truly believed his handling of the \$41,000 cost advance as an expense was the proper way to handle it. TR 1406. Wintch, who has extensive experience in fraud investigations, TR 1400, found no evidence of an intent to fraud or embezzle on Marshall's part. TR 1430-31. Rather, the way in which Marshall treated the \$41,000 was nothing more than an error. TR 1431.

By way of another example, the evidence clearly shows Marshall notified his clients of the adverse summary judgment order and explained to them the purposes and potential benefit of an appeal. The record establishes the clients were fully aware of Marshall's belief that an appeal of the summary judgment was the best course of action to take and of Marshall's intent to file the notice of appeal. None of the clients objected

to that course of action. The evidence does not sustain a finding that Marshall knowingly filed an appeal without his clients' consent.

Also, the record does not sustain the finding that Marshall knowingly violated RPC 1.7(b) with respect to the representation of multiple clients. Marshall testified he obtained signed conflict waivers from the clients and also reasonably believed, because the clients' interests were aligned, representing the clients would not materially limit his responsibilities to any client individually.

Additionally, the record does not support the finding Marshall knowingly split a fee with a non-lawyer. The overwhelming weight of the evidence in the record is that Marshall neither discussed splitting a fee with Perryman or actually split a fee. In paying Perryman out of the settlement proceeds, Marshall merely effectuated the separate agreement Perryman had with the longshoremen.

Third, any misconduct committed by an attorney may actually or potentially cause harm, but in this case, the harm arising from Marshall's alleged misconduct is remarkably minor. It is important to again remember that Marshall took on a difficult case, difficult not only as to the clients involved, but also as to the issues and opposing parties. He took on the case at a time when the statute of limitations was about to expire. Importantly, Marshall achieved a successful result for the clients.

With respect to the Ninth Circuit appeal, even if unauthorized, Marshall obtained a successful result. Had the plaintiffs so desired, they could have obtained a valuable settlement based on that result. Far from harming the plaintiffs, the appeal offered them a significant financial benefit.

As to the allegation of fee splitting with a nonlawyer, the plaintiffs were not harmed by Marshall's conduct. Wayne Perryman had an enforceable contract with the plaintiffs entitling him to a payment of \$80,000 from the settlement proceeds. Marshall's alleged misconduct resulted in the plaintiffs having to pay *less* than that contracted amount.

With regard to the allegation of conflict of interest in Marshall's representation of multiple clients, the clients received significant individual benefits and a share of the \$800,000 settlement. Absent such a group of plaintiffs, it is unlikely the plaintiffs would have obtained counsel or achieved the successful result.

With respect to the allegation Marshall failed to properly account to the clients or improperly treated the client's advance cost payments or the payment of contract attorneys as costs, the harm was not significant given the fact Marshall voluntarily agreed to accept a fee less than the 40% to which he was contractually entitled.

The Board found *none* of the ABA mitigators was present and several aggravators applied. Finding of Fact 91. This finding, too, was erroneous.

Several of the aggravators found by the Board are not supported by the record. Marshall had substantial experience in the law, but the prior disciplinary offenses were remote and not relevant to the considerations in this case. It is not appropriate to find as an aggravator that he refused to acknowledge the wrongful nature of conduct since this essentially punishes him for asserting his innocence. Marshall was not indifferent to restitution. Nothing in the record supports this. Marshall and the clients worked out a distribution that was satisfactory to all of them and to which they all agreed. The clients agreed with Marshall that they had worked out a distribution. Marshall cannot be indifferent to something which has not been an issue. Accordingly, the only aggravators which could be applicable in this case are substantial experience and multiple offenses. It should, however, be kept in mind that the multiple offenses arise out of one matter and not out of the representation of several clients in several different matters.

Marshall was entitled to several of the mitigators found at Standard 9.3. There is no evidence to show Marshall acted with a dishonest or selfish motive. At all times, Marshall worked to make a case, which

others thought could not be made, and to obtain the best possible result for his clients in this very difficult case. Even the arrangement with Perryman, assuming it was fee splitting, resulted in Marshall agreeing to take a lesser fee and only served to effectuate the agreement Perryman already had with the clients.

Marshall was also entitled to the mitigator for character or reputation. As the letters submitted in connection with the Bar's motion for interim suspension attest, Marshall is a pillar of the African-American community and bar. He has taken on difficult cases, like *Jeffries*, representing clients who might not otherwise have access to counsel.

If there was misconduct, there has been interim rehabilitation as demonstrated by Marshall's willingness to accept the determination of his accountant expert that the cost advances needed to have been handled differently. At a minimum, Marshall is entitled to the mitigators of absence of dishonest or selfish motive, interim rehabilitation, and remoteness of any prior offense.

Finally, this Court has emphasized that proportionality is also crucial in imposing sanctions even though it is not specifically addressed in the ABA Standards. *Kuvara*, 149 Wn.2d at 255-56. Marshall bears the burden of establishing the Board's sanction was disproportionate. *In re Disciplinary Proceeding Against Kagele*, 149 Wn.2d 793, 821, 72 P.3d

1067 (2003). The Bar can point to no cases similar to Marshall's where disbarment was imposed by this Court. Disbarment should not be the sanction even if the allegations regarding the Ninth Circuit appeal or conflict of interest are sustained. Similarly, even if the allegations pertaining to fee splitting or the accounting for expenses are maintained, disbarment is inappropriate.

This Court has declined to disbar attorneys where their conduct was far more venal than anything Marshall did. *See, e.g., Haskell, supra* (attorney deliberately switched initials on billings to charge clients excessive fees and manipulated expenses to fly first class; 2-year suspension); *In re Disciplinary Proceedings Against Dann*, 136 Wn.2d 67, 960 P.2d 416 (1998) (lawyer switched initials so that clients would think ~~that he had done work actually done by associates and then lied to clients;~~ one-year suspension); *In re Disciplinary Proceeding Against Boelter*, 139 Wn.2d 81, 985 P.2d 328 (1999) (lawyer billed unreasonable amounts to a client and then improperly threatened to reveal client confidences in a suit to collect those fees; six-month suspension); *Tasker, supra* (lawyer commingling personal and client funds to prevent garnishment of his funds for back child support; Court rejected disbarment in favor of two-year suspension); *In re Disciplinary Proceeding Against Carmick*, 146 Wn.2d 582, 48 P.3d 311 (2002) (lawyer made misrepresentation to a court

in ex parte proceedings and negotiated directly with represented party; 60-day suspension); *McKean, supra* (lawyer who entered into a business arrangement with a client to shield client from creditors, financed business with funds borrowed from his trust account and used the trust account for his own business purposes; six-month suspension); *In re Disciplinary Proceeding Against Brothers*, 149 Wn.2d 575, 70 P.3d 940 (2003) (lawyer who had previously been sanctioned for similar conduct charged a \$36,000 fee for what may have been \$50 in work; one-year suspension); *Cohen, supra* (lawyer failed to prepare and file a response to summary judgment motion, failed to keep clients informed of adverse ruling on motion and then billed clients for appeal stemming from his own misconduct; six-month suspension); *In re Disciplinary Proceeding Against DeRuiz*, 152 Wn.2d 558, 99 P.3d 881 (2004) (attorney neglected cases, failed to communicate with clients, did not refund excessive and unearned fees, and failed to cooperate with Bar in two separate grievances; two six-month suspensions); *In re Disciplinary Proceeding Against Dynan*, 152 Wn.2d 601, 98 P.3d 444 (2004) (attorney submitted declarations in support of court-awarded fees with altered invoices; six-month suspension); *In re Disciplinary Proceeding Against Lopez*, 153 Wn.2d 570, 106 P.3d 221 (2005) (lawyer failed to file opening federal appellate brief; 60-day suspension); *In re Disciplinary Proceeding Against*

Christopher, 153 Wn.2d 669, 105 P.2d 976 (2005) (lawyer falsified court document and forged secretary signature to avoid malpractice; 18-month suspension/3-year probation).

It is difficult to discern how the allegations against Marshall can justify disbarment when those in *DeRuiz* warranted only two six-month suspensions. The attorney, DeRuiz, committed violations of the RPCs with respect to multiple clients. He failed to appear at a client's probation review hearing for which the client specifically hired him. He repeatedly failed to return telephone messages left by the clients and letters sent by the clients questioning his failure to appear and inquiring about the status of their cases. DeRuiz also failed to refund unreasonable, unearned fees he collected from the clients. He failed to appeal a client's license revocation. Unlike in Marshall's case, DeRuiz's misconduct caused

substantial harm to the clients. For example, the client whose license had been revoked lost his job as a commercial truck driver because he was unable to provide his employer with information about the status of his license. Also, DeRuiz's failure to appear at the probation review hearing significantly delayed resolution of the client's probation review. Here, by contrast, the misconduct Marshall allegedly committed had a minimal negative impact on the clients. They all received monetary awards, some received promotions, and all reaped the benefits of the systemic changes.

The attorney in *DeRuiz* received only two six-month suspensions for his conduct. In relation to *DeRuiz's* conduct, Marshall's alleged misconduct is far less egregious and resulted in significantly less harm to his clients. Disbarment as a sanction is clearly disproportional.

In the recent cases where this Court ordered disbarment of the attorney, the attorney's conduct was far more reprehensible than anything Bradley Marshall is alleged to have done. *See, e.g., In re Disciplinary Proceeding Against Whitney*, ___ Wn.2d ___, 120 P.3d 550 (2005) (lawyer lied under oath while acting as guardian ad litem and then failed to cooperate fully or on a timely basis with the Bar's investigation); *In re Disciplinary Proceeding Against Kronenberg*, 155 Wn.2d 184, 117 P.3d 1134 (2005) (attorney bribed and tampered with prosecution witness in child rape case); *Schwimmer, supra* (lawyer committed numerous unethical acts including failing to appear at trial, making misrepresentations to a court, and deliberately stealing client funds); *Vanderbeek, supra* (attorney charged numerous clients patently unreasonable fees and misused attorney liens to collect fees); *Romero, supra* (numerous violations including charging court-appointed clients in criminal cases for fees and costs); *In re Disciplinary Proceeding Against Guarnero*, 152 Wn.2d 51, 93 P.3d 166 (2004) (attorney forged client signature on declaration); *Whitt, supra* (attorney entered into settlement

without client authorization and case was dismissed); *In re Disciplinary Proceeding Against Miller*, 149 Wn.2d 262, 66 P.3d 1069 (2003) (attorney took advantage of elderly client so as to be named in her will and obtain her assets); *In re Disciplinary Proceeding Against Anschell*, 149 Wn.2d 484, 69 P.3d 844 (2003) (multiple instances of attorney neglect); *Kuvara, supra* (attorney listed dead man as grantor on deed, notarizing his signature).

Disbarment here is disproportionate and excessive under these circumstances.

Disbarment is generally appropriate when a lawyer knowingly violates a court order or rule with the intent to obtain a benefit for the lawyer or another, and causes serious injury or potentially serious injury to a party or causes serious or potentially serious interference with a legal proceeding.

ABA Standard 6:21.

The evidence does not show Marshall knowingly violated any Rule of Professional Conduct. Any violation was the result of negligence alone. There is no evidence Marshall acted to obtain a benefit for anyone but his clients. He obtained a substantial monetary settlement for the clients, as well as promotions for several of them and system-wide changes beneficial to all. There certainly is no evidence Marshall acted to obtain a benefit for himself. Indeed, he took less of the settlement proceeds as a fee so as to maximize each client's recovery. And, as

discussed, any injury caused by any negligence on Marshall's party did not, by any means, cause serious or potentially serious injury to anyone or serious or potentially serious interference with a legal proceeding.

Even if the allegations against Marshall are sustained, the appropriate sanction should be a reprimand or an admonition.

With respect to filing an appeal without the clients' consent, Marshall was at most negligent. A finding of knowing or intentional conduct cannot be sustained in light of the numerous letters Marshall sent to the clients addressing the appeal and the numerous meetings between Marshall and all the clients at which the appeal was discussed. ABA Standard 4.43 recommends a reprimand where a lawyer is negligent and does not act with reasonable diligence in representing a client. Because, however, Marshall obtained a successful result for four of the clients, an admonition would be the appropriate sanction. *See* ABA Standard 4.44.

With respect to Marshall's multiple representation of the clients, ABA Standard 4.33 calls for a reprimand where the lawyer is negligent in determining the existence of a conflict of interest. The evidence shows that, at most, Marshall was negligent. Again, an admonition would be more appropriate, however, because the alleged conduct was an isolated incident and caused little or no harm to any of Marshall's clients. *See* ABA Standard 4.34.

With regard to the allegation of fee-splitting, if Marshall was negligent and caused injury to the client, the public, or the legal system, a reprimand is the appropriate sanction. *See* ABA Standard 7.3. Where, as here, the alleged fee-splitting is an isolated instance and causes little or no harm to the client, the public, or the legal system, an admonition is the appropriate sanction. *See* ABA Standard 7.4.

Finally, with regard to Marshall's alleged failure to account for the settlement proceeds, a reprimand would be the appropriate sanction when the lawyer is negligent in dealing with client property and injuries to the client. ABA Standard 4.13. Where such negligence does not cause injury to the client, an admonition is the appropriate sanction. ABA Standard 4.14.

Disbarment under the facts of this case is inappropriate. The more appropriate sanction, even if the Bar's allegations are upheld, is either a reprimand or admonition.

F. CONCLUSION

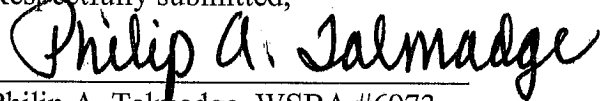
The Board's findings on key factual matters are not supported by evidence that is highly probable. This Court should vacate those findings.

The Board's recommendation to disbar Bradley R. Marshall, based on a seven to six vote, is not sustainable on this record. Marshall asks this Court to dismiss the charges against him in their entirety or, alternatively,

to impose only such sanctions as are commensurate with the sustained allegations against him. Costs on appeal should be awarded to Marshall.

Dated this 12th day of December, 2005.

Respectfully submitted,



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APPENDIX

FILED

JUL 27 2005

DISCIPLINARY BOARD

BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

In re

BRADLEY R. MARSHALL

Lawyer

WSBA No. 15830

Public No. 02#00075

DISCIPLINARY BOARD MAJORITY
OPINION

This matter came before the Disciplinary Board on April 1, 2005 on Respondent's appeal of the Hearing Officer's suspension recommendation. The Board amends the Hearing Officer's Findings of Facts and Conclusions of Law and recommends disbarment.

The Board's standard of review is set out in ELC 11.12 (b):

The Board reviews findings of fact for substantial evidence. The Board reviews conclusions of law and recommendations de novo. Evidence not presented to the hearing office or panel cannot be considered by the Board.

The following facts were proven by a clear preponderance of the evidence¹:

1) Respondent Bradley R. Marshall was admitted to the practice of law in the State of Washington on June 2, 1986.

¹ The Board amended the following Findings or Conclusions: 50, 54, 56, 60, 61, 62 (deleted), 63 (deleted), 64, 76, 77, 78 (deleted), 82, 83, 86 (deleted), 88, 89, 92, 93, and 98 (deleted).

1 2) In 1995, several longshoremen, including some of the longshoremen who
2 became plaintiffs in the *Jeffries* case, signed an agreement to pay Consultants
3 Confidential \$5,000 to prepare and present a class action lawsuit for
4 consideration by the U.S. Department of Justice. They agreed to have
5 Consultants Confidential act as their representative throughout the case until it
6 was finally settled. They agreed to pay Consultants Confidential ten percent of
7 the total final settlement as a fee for the consultant's services plus pre-approved
8 travel expenses associated with the case. Wayne Perryman, a non-lawyer, was
9 the president of Consultants Confidential and he signed the contract.
10 ("Perryman Contract").

11 3) Mark Wheeler is an attorney who was employed by Zion Preparatory
12 Academy. At the time of December 1996, Wheeler had the use of a workspace
13 and a desk in the Respondent's law offices. Wheeler's name appeared on the
14 stationary of the Respondent's firm and Wheeler had business cards with his
15 name under the Respondent's firm's name. It is unclear what the formal
16 business relationship was between Wheeler and Respondent. Respondent
17 claims that Wheeler was first an associate and then was made a partner of his
18 firm in 1998. Wheeler says he was neither and that he was not an employee of
19 the firm. Wheeler would refer cases to Respondent and would share the fees on
20 those cases and would sometimes work on cases.

21 4) Perryman approached Wheeler at the Zion Prep School and asked him to
22 look at the longshoremen's case. Wheeler said that he could not take the case
23 on his own and that he would be referring it to the Respondent. Wheeler said
24 that Respondent would be making the decisions regarding the case.

25 5) In December 1996, prior to the filing of the *Jeffries* lawsuit, Perryman met
26 with Respondent and informed him that if Respondent accepted the case,
27 Perryman would have to be paid. Perryman offered Respondent the option of
honoring the contract he had with the longshoremen and paying Perryman ten
percent of the final settlement for the case or paying Perryman \$200 per hour
for the hours he had spent on the case to date. Respondent said that the \$200
per hour fee that Perryman charged was too high and would probably not be
allowed by the Court. Respondent also said that he could not accept Perryman's
original agreement to receive ten percent of the final settlement because it
would be seen as fee-sharing. Respondent told Perryman that he and Wheeler
would work out a way to honor the ten percent in the Perryman Contract
without it appearing to be fee sharing.

6) On or about December 18, 1996, *Jeffries v. IL WU, et al.* was filed by
Respondent's firm, Marshall Law Offices, in the United States District Court,
Western District of Washington (Tacoma), Cause No. 96-CV-06032FDB.
There were 12 named plaintiffs at the time of filing.

1 7) In a January 9, 1997 letter to plaintiffs, Wheeler said that the Marshall
2 Law Offices would be retaining Perryman as an "expert" and that Perryman
3 would continue his investigative and consulting responsibilities. There was no
4 written financial agreement between the Marshall Law Offices and Perryman.

5 8) Respondent also retained Jim Tessier as a "consultant expert" in the
6 *Jeffries* case. Respondent agreed in writing to pay Tessier \$120 per hour and
7 asked Tessier to provide his firm with an itemized monthly statement of
8 services provided and then the Marshall Law Offices would reimburse by
9 check within three days. Respondent did not have any such agreement, written
10 or verbal, with Perryman. Perryman did not send interim billing statements to
11 Respondent for any work performed during the *Jeffries* case, whereas Jim
12 Tessier was specifically requested by Respondent to do so and he did so.

13 9) On or about January 16, 1997, Respondent met with the *Jeffries* plaintiffs
14 for the first time. Perryman also attended the meeting.

15 10) At the January 16, 1997 meeting, Respondent distributed a copy of an
16 attorney-client agreement ("Contingency Fee Agreement") form from the
17 Marshall Law Firm. Section 2 of the form addressed the issue of attorney fees
18 and stated, among other things, the following: "Attorneys will receive an
19 attorney fee of forty percent (forty percent) of all sums recovered by settlement
20 or trial. . . The attorney fee will be calculated before deduction of costs. If there
21 is no recovery, no attorney fee will be paid."

22 11) The Contingency Fee Agreement had Respondent's usual fee of 33 1/3
23 percent crossed out and forty percent in its place. Some of the plaintiffs were
24 provided a copy of Respondent's regular contingency fee agreement which
25 included Respondent's usual fee of 33 1/3 percent which Respondent then
26 ~~withdrew, telling them that it was a mistake, and replaced it with an agreement~~
27 that reflected a forty percent fee.

12) Respondent informed the *Jeffries* plaintiffs that his law firm would be
reducing its normal fee from 33 1/3 percent to thirty percent of any settlement
or judgment resulting from the longshoremen's claims. Respondent said that he
would be charging plaintiffs a total fee of forty percent of the settlement or
judgment amount which would cover the ten percent the plaintiffs had agreed
to pay Perryman under the Perryman Contract.

13) At the January 16, 1997 meeting, Respondent informed the plaintiffs that
they would not have to pay Perryman anything under the Perryman Contract,
and that to get around the appearance of fee-sharing with Perryman,
Respondent would charge the plaintiffs a forty percent attorney's fee and then
divide the fee between his law firm and Perryman, giving his firm thirty
percent and Perryman ten percent. Respondent informed some of the plaintiffs
not to tell anyone about his financial arrangement with Perryman.

1 14) Respondent asked Perryman to trust him and he promised Perryman that
2 he would receive the ten percent owed to him under his contract with the
3 plaintiffs. Respondent told Perryman that he could not put the agreement
4 between himself and Perryman in writing without it appearing to be fee
sharing. Respondent and Perryman agreed that if there was no settlement or
judgment in the *Jeffries* case then Perryman would receive nothing.

5 15) At the conclusion of the *Jeffries* case, Respondent instructed Perryman to
6 prepare a bill totaling ten percent of the settlement amount in such a way that it
7 would appear to be based on an hourly rate. Respondent told Perryman to use
8 an hourly rate so it would not look like he was being paid out of the fees owed
9 to the Respondent's firm. The fee-splitting arrangement between Perryman and
10 Respondent, while never committed to a written agreement, is reflected in
Perryman's bill to Respondent, dated June 8, 1998. Perryman's invoice for
\$80,000 for 1,000 hours at \$80 per hour for "Investigative and Consulting
Services from March 1995 to June 8, 1998" was exactly ten percent of the
\$800,000 settlement amount in the *Jeffries* case.

11 16) After receiving Perryman's bill, Respondent asked Perryman to reduce
12 the bill by \$10,000 and Perryman subsequently reduced his bill to \$70,000.
13 Respondent told Perryman that he could also charge for Xerox copies, mileage
and some basic expenses so Perryman added \$1,459 in expenses to his bill.
14 Perryman was paid \$71,459.00 by Respondent from the *Jeffries* settlement.

15 17) In a June 1998 meeting at Respondent's office, Respondent gave the
16 plaintiffs copies of a written document entitled "Settlement Accounting." This
17 document reflected a thirty percent fee owed to the Marshall Law Offices and
\$71,459.00 owed to Perryman. After handing out copies of this document,
18 Respondent asked for them back because, he said, he did not want the other
19 side to see them. Ruben Chavez kept a copy of the document. Although
20 Respondent initially questioned the authenticity of this document at the
grievance hearing, he later testified that the document reflected the suggestion
of Respondent's bookkeeper as a means to provide a larger amount of the
settlement proceeds to the plaintiffs.

21 18) Respondent's testimony regarding his financial arrangement with
22 Perryman was not credible.

23 19) With regards to the *Jeffries* case, respondent and Perryman (a non-
24 lawyer) had a fee sharing (fee-splitting) agreement. The agreement entitled
25 Perryman to ten percent of the final settlement or judgment. If there was no
26 settlement or judgment, then Perryman would not be paid. If there was a
27 settlement, the agreement was that Respondent would pay Perryman ten
percent of the settlement regardless of how much work Perryman had done for
Respondent. Respondent increased his contingency fee to forty percent in order
to cover the amount that would be owed to Perryman if a settlement was
reached.

1 20) Respondent did not ever discuss with Michael Chambers, Ruben Chavez,
2 Rodney Rhymes, or Bruce Walker, four of the *Jeffries* plaintiffs, potential
3 conflicts of interest and problems associated with representing multiple
4 plaintiffs in a single lawsuit. Respondent never provided Chambers, Chavez, or
5 Rhymes with a waiver of conflicts form. Respondent may have given Walker a
6 waiver of conflicts form to sign, but it was not explained to Walker. Walker
7 did not have time to read it, did not understand it, and was not given a copy to
8 keep.

9 21) The *Jeffries* plaintiffs were members of different locals of the ILWU and
10 the practices in these locals were different. Some of the plaintiffs worked in
11 Seattle and some worked in Tacoma. The plaintiffs were registered at different
12 levels and held different jobs. Although the plaintiffs had certain broad goals in
13 common, their individual issues, needs, and claims were different.

14 22) Meetings between the plaintiffs and Respondent frequently included
15 arguments and conflict between the plaintiffs. Each client's case was discussed
16 in roundtable fashion in front of all other plaintiffs. Respondent did not meet
17 separately with the *Jeffries* plaintiffs to discuss their individual cases. Chavez
18 expressed frustration at being unable to meet with Respondent individually to
19 discuss his claims.

20 23) Respondent informed the plaintiffs that the claims of the Seattle plaintiffs
21 were weaker and that he wanted to bolster the Seattle claims with those of the
22 Tacoma plaintiffs.

23 24) Chavez was advised by Respondent not to discuss the "tainted hours"
24 issue in his deposition in the *Jeffries* case because Respondent was saving the
25 issue for another lawsuit. Shortly after the *Jeffries* case settled in June 1998,
26 Respondent filed a separate lawsuit involving the tainted hours issue. At least
27 one of the *Jeffries* plaintiffs had a claim related to tainted hours.

28 25) On May 21, 1998, Judge Burgess issued an Order Denying Plaintiffs'
29 Motion to Clarify/Reconsider Grant of Summary Judgment on Hostile Work
30 Environment Claims in the *Jeffries* case. The order stated that the case had
31 been "characterized (and significantly flawed) by the plaintiffs' failure to
32 present the specific factual basis required to withstand summary judgment as to
33 the individual claims of each plaintiff." The order also stated that the standards
34 of factual proof are not relaxed "simply because more than one plaintiff has
35 joined in this case."

36 26) Respondent testified that he understood the risks of representing multiple
37 clients in a single lawsuit. Respondent knew or should have known that the
38 claims of the various *Jeffries* plaintiffs were not identical, that the value of
39 each claim was not identical, and/or that there was a significant risk that
40 conflicts existed and would exist in the future.

1 27) Respondent failed to obtain a written consent or written waiver of
2 conflict from at least four of the *Jeffries* plaintiffs and failed to explain to them
3 the risks of multiple representation in the *Jeffries* lawsuit.

4 28) Respondent's testimony regarding the waiver of conflict form was not
5 credible.

6 29) On or about April 27, 1998, Judge Burgess granted partial summary
7 judgment in favor of Local 98 of the ILWU, dismissing Local 98 from the
8 *Jeffries* litigation.

9 30) On or about May 26 1998, Respondent filed appeals of the dismissal of
10 Local 98 on behalf of all *Jeffries* plaintiffs without the knowledge or
11 authorization of at least three of his clients that were named as plaintiffs on the
12 appeal; Chambers, Chavez and Rhymes.

13 31) After filing the notices of appeal, Respondent did not provide at least
14 three of the plaintiffs on the appeal, Chambers, Chavez and Rhymes, with any
15 meaningful explanation of the facts of the appeal and its consequences for each
16 of them as individuals while the appeal was pending.

17 32) In a letter dated June 11, 1998 to the *Jeffries* plaintiffs, Respondent
18 briefly mentions that the case against Local 98 was pending before the Ninth
19 Circuit Court of Appeals. This letter did not meaningfully inform the plaintiffs
20 of the purpose of the appeal, its impact on each of them as individuals or its
21 consequences in the event that they chose not to continue to litigate against
22 Local 98.

23 ~~33) On June 8, 1998, immediately following settlement of the *Jeffries* case a~~
24 ~~number of the plaintiffs told Respondent that they were unhappy with him and~~
25 ~~frustrated with the outcome of the case. Ruben Chavez told Respondent that he~~
26 ~~was done with him and instructed Respondent not to do anything else for him.~~
27 ~~Nevertheless, despite being discharged by Chavez, Respondent continued to~~
~~represent Chavez in the appeal against Local 98.~~

34) After Respondent filed the appeal he called Chambers to notify him.
Chambers asked Respondent why he filed the appeal and said that he did not
request Respondent to file the appeal.

35) As part of the June 1998 *Jeffries* settlement, it was agreed that the
pending appeals against all settling defendants would be dismissed; Local 98
was not a settling defendant.

36) On June 22, 1998, Respondent's law firm sent letters to *Jeffries* plaintiffs
Tracey Montgomery, Darnell Walker, Bruce Walker and Robert Frazier
informing them that they had a right to appeal dismissal of their claims but that

1 the Marshall Law Offices could not handle their appeals because the office did
2 not specialize in appeals.

3 37) On June 5, 1998, Bruce Walker, one of the appellants, sent a certified
4 letter to Respondent requesting a copy of his file. On June 23, 1998, Walker
5 sent a letter to Respondent, with a copy to Judge Burgess, in which he raised
6 concerns about Respondent's handling of his case and again requested a copy
7 of the file. On July 2, 1998, Walker sent a letter to Respondent, return receipt
8 requested, in which he rescinded his signature on the *Jeffries* settlement
9 agreement, a right guaranteed to him by that agreement, and again requested a
10 copy of his file. On or about March 22, 2001, Walker filed a complaint for
11 legal negligence against Respondent.

12 38) On July 11, 1998, Ruben Chavez wrote a letter, which was faxed to
13 Respondent on August 11, 1998, asking Respondent for a copy of his retainer
14 agreement and a detailed itemized cost breakdown; the letter reflected that he
15 was copying the Washington State Bar Association (WSBA) and King County
16 Bar Association (KCBA). Respondent sent a letter to Chavez acknowledging
17 receipt of Chavez's letter on August 13, 1998.

18 39) On August 27, 1998, Ruben Chavez and his (now) wife Tracy Chavez
19 ("the Chavez's"), wrote a letter to Respondent, again seeking a breakdown of
20 costs and a copy of the retainer agreement. This letter also stated that Chavez
21 was copying the WSBA and KCBA. Respondent received Chavez's letter and
22 replied on September 14, 1998 stating that he could not locate a copy of the
23 retainer agreement.

24 40) On January 5, 1999, the Chavez's wrote another letter to Respondent,
25 again requesting a copy of the retainer agreement and cost breakdown and
26 questioning some of Respondent's billings. This letter also was copied to the
27 WSBA and the KCBA. Respondent received Chavez's letter and replied on
January 20, 1999. Respondent said that he would make the requested
documents available at his office for the Chavez's to review.

41) On January 29, 1999, the Chavez's sent another letter to Respondent,
again asking for a copy of the retainer agreement. This letter also was copied to
the WSBA and the KCBA. Respondent received Chavez's letter and replied on
February 1, 1999 that he was still unable to locate the retainer agreement.

42) Tracy Chavez attempted to fax a letter dated June thirty, 1999 on behalf
of Ruben Chavez to Respondent, notifying Respondent that he was
withdrawing from the *Jeffries* case. There is no evidence that Respondent
received this fax on that date. Respondent sent a letter to Chavez on July 11,
2000 stating that he had just received a fax from Chavez dated July 10, 2000 as
well as an attached letter from June 30, 1999.

1 43) On or about November 22, 1999, the Ninth Circuit Court of Appeals
2 affirmed in part and reversed in part Judge Burgess' April 24, 1998 ruling as to
3 four of the fifteen Jeffries plaintiffs (Chavez, Chambers, Woods, and
4 Montgomery).

5 44) On or about March 13, 2000, a petition for re-hearing en banc was denied
6 by the Ninth Circuit Court of Appeals.

7 45) In 2000, after the Ninth Circuit decision, Local 98 made an offer to settle
8 with the four *Jeffries* plaintiffs for \$10,000.00.

9 46) Respondent did not convey this offer to Chavez.

10 47) In a letter dated July 19, 2000, Respondent advised Chavez, that he
11 would be required to pay for the legal fees for the appeal.

12 48) Respondent did not keep time records for the appeal.

13 49) On or about December 11, 2000, Ruben Chavez, Douglas Woods, and
14 Michael Chambers filed a grievance against Respondent with the Washington
15 State Bar Association.

16 50) On June 27, 2001, Respondent sued his former clients, Chavez, Woods,
17 Chambers and Montgomery, to collect fees and costs for pursuing an appeal
18 against Local 98. As a result of this suit, Chavez, Woods, Chambers and
19 Montgomery incurred attorney's fees and costs in the amount of \$33,488.00,
20 for which they were each responsible for one-quarter (\$8,372.00), and were
21 ultimately paid settlement monies to Respondent in the amount of \$8,000.00.

22 51) The Contingency Fee Agreement between Respondent and the *Jeffries*
23 plaintiffs provided, among other things, that any lawyer associated in the
24 *Jeffries* lawsuit would be associated without additional expense to the
25 plaintiffs. The agreement stated: "Attorneys reserve the right to associate with
26 other attorneys in clients' representation, without additional expense to clients.
27 Clients consent to such association and to a division of attorney fees as may be
agreed upon between associated counsel."

52) Respondent said that he employed three "research lawyers" on the
Jeffries case. The Respondent's firm kept track of the number of hours these
lawyers worked on the *Jeffries* case. Respondent said that he charged the time
these lawyers spent on the case to the clients as a cost rather than as attorney's
fees.

53) Between May 1997 and June 1998, Respondent charged the plaintiffs
costs of approximately \$9,473.75 that Respondent had paid associated and/or
hired contract attorneys for legal work performed in the *Jeffries* lawsuit. This
amount was in addition to the contingency fee for attorney's fees charged by

1 the Respondent's firm. The plaintiffs did not authorize these charges, and the
2 Chavez's wrote to Respondent questioning the charges.

3 54) Respondent could not charge these legal fees as costs.

4 55) Respondent charged the following expenses as costs to the *Jeffries*
5 plaintiffs: November ten, 1997-\$450 billed for airfare from Los Angeles,
6 California to Houston, Texas; June 11, 1998-\$100 billed for a donation
7 Respondent made to a church for a meeting room the church provided at no
8 charge to the Jeffries plaintiffs; December 11, 1997-\$667.40 billed for a video
9 recorder and January 8, 1998-\$45.61 billed for a tripod. These items were used
10 for videotaped depositions in the *Jeffries* case in order to reduce the costs of
11 having to hire a professional videographer. The Association failed to prove by
12 a clear preponderance that any of these charges were inappropriate, excessive
13 or personal.

14 56) Between March 1997 and May 1998, the plaintiffs paid Respondent
15 approximately \$41,000 as an advance for costs. Respondent did not use this
16 money to cover any costs and eventually repaid his clients for the full advance
17 amount of \$41,000. However, in doing so, Respondent charged the \$41,000
18 repayment to his clients as a litigation cost. Respondent inappropriately treated
19 the refund of the \$41,000 cost advance as an expense charged to his clients.
20 This resulted in Respondent retaining \$41,000 that is still owed to his clients.

21 57) On June 8, 1998, Respondent settled the *Jeffries* case with the remaining
22 defendants for \$800,000.

23 58) Between June 27 and July 1, 1998, fourteen of the plaintiffs signed a
24 settlement agreement stating, in part, that the total compensation to the
25 plaintiffs would be \$800,000. The fifteenth plaintiff, Bob Frazier, elected not to
26 settle prior to the agreement being read into the record on June 8, 1998.

27 59) In July and August 1998, Respondent received the \$800,000 in
settlement payments and distributed approximately \$381,418.09 among the
fourteen settling plaintiffs.

60) Respondent retained attorney's fees of \$35,459.00. Mr. Marshall
intentionally split this fee with Mr. Perryman, retaining \$234,000 and
disbursing \$71,459.99 to Perryman.

61) Respondent charged his clients \$108,122.91 for litigation costs. These
costs included \$9,473.75 in contract legal fees paid to four attorneys, Justin
Zaug, Bill LaBorde, Jay Scott, and Bryce Carlen. Under the written
contingency fee agreement it was inappropriate to charge these fees.
Respondent knowingly charged these fees in violation of the written fee
agreement (see findings 51-54).

1 62) Despite repeated demands, Respondent did not provide the Bar
2 Association or Chavez with complete receipts and disbursal records concerning
3 the \$800,000 settlement, and never provided an appropriate accounting for the
4 distribution of all of the \$800,000 settlement or all of the advanced costs the
5 plaintiffs paid. Respondent did not provide complete client registers, check
6 registers, general account files or appropriate backup documentation for the
7 expenses Respondent claimed.

8 63) On May 19, 1989, Respondent received an Admonition from the WSBA
9 for 1) Not promptly responding to requests by the Association to submit
10 documentation in compliance with RPC 1.14 and 2) Not providing full and
11 complete responses to Association inquiries in violation of RLD 2.8.

12 64) On July 17, 1998, Respondent received a Reprimand from the WSBA for
13 directing his staff to prepare declarations of a client and one of her friends and
14 to "emulate" their signatures on the declarations. Respondent then knowingly
15 filed the declarations with false signatures in support of a motion for
16 reconsideration and then filing them with the court. This conduct violated RPC
17 3.3(a)(I) and (4), RPC 4.1(a), RPC 5.3, RPC 8.4(a), (c) and (d). The date of
18 these violations was February 1992.

19 65) On June 13, 2001, Respondent signed a Washington State Bar
20 Association form entitled "Declaration of Supervising Lawyer," pursuant to
21 Rule 9 of the Admission to Practice Rules so that, with the approval of the
22 WSBA Board of Governors and the Washington State Supreme Court,
23 Respondent could become the supervising lawyer for a legal intern candidate
24 from June 13 to August 30, 2001.

25 66) Paragraph (1) of the "Declaration of Supervising Lawyer" reads as
26 follows: "I am an active member in good standing of the Washington State Bar
27 Association and have had no disciplinary sanctions imposed in the last five
28 years. ..." Respondent signed the "Declaration of Supervising Lawyer" on June
29 13, 2001, certifying under penalty of perjury that the information on the form
30 was "complete, true and correct." Respondent's statement that he had had no
31 disciplinary sanctions imposed against him in the five years prior to June 13,
32 2001, was not true.

33 67) The Association failed to prove by a clear preponderance that
34 Respondent intentionally misrepresented his disciplinary record under penalty
35 of perjury.

36 68) Respondent caused injury to his clients by taking fees to which he was
37 not entitled and for charging his clients for cost items which were not properly
38 chargeable as costs.

69) Respondent caused injury to his clients by not according them their rights as individual litigants and by not explaining to them the implications of common representation.

70) By splitting a forty percent contingent attorney's fee with a non-lawyer and then working to conceal that fact, Respondent caused injury to the legal system and the legal profession.

71) The Association dismissed Count I on April 2, 2004.

COUNT II

72) By filing the appeal in the Jeffries lawsuit without his clients' permission, failing to abide by their wishes regarding such representation, and failing to inform them of the consequences of such an appeal, Respondent violated RPC 1.2(a) requiring a lawyer to abide by a client's decisions concerning the objectives of representation and to consult with the client as to the means by which they are to be pursued and RPC 1.2(f) prohibiting a lawyer from willfully purporting to act as a lawyer for any person without the authority of that person, and RPC 1.4(b) requiring a lawyer to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation and subjects Respondent to discipline pursuant to ELC 1.1. Count II is proven. With respect to this conduct, Respondent acted knowingly.

COUNT III

73) The Association dismissed Count III on April 2, 2004.

COUNT IV

74) By charging excessive costs, Respondent violated RPC 1.5(a) requiring that a lawyer's fees be reasonable and subjects Respondent to discipline pursuant to ELC 1.1. Count IV is proven. With regard to the \$41,000 improperly charged as a cost, the conduct was intentional when Mr. Marshall retained the funds even after client Chavez questioned the accounting.

75) Except for the improper retention of the \$41,000 and the \$9,473.75, the Association failed to prove the allegations that Respondent charged and took payment of attorney's fees in excess of the forty percent agreed contingency fee from the settlement in the *Jeffries* lawsuit and that Respondent charged and made payment of personal expenses that he charged as costs.

COUNT V

76) By representing one or more of the longshoremen without explaining to each of them the implications of the common representation, and without explaining both the advantages and risks involved, and by failing to obtain written waivers from one or more of the longshoremen, Respondent violated RPC 1.7(b) prohibiting a lawyer from representing a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client unless the client consents in writing after consultation and a full

1 disclosure of the material facts and subjects Respondent to discipline pursuant
2 to ELC 1.1. Count V is proven. With respect to this conduct, Respondent acted
3 knowingly.

4 **COUNT VI**

5 77) The Association has failed to prove the alleged violations of the Rules of
6 Professional Conduct in Count VI.

7 **COUNT VII**

8 78) By failing to maintain complete receipt and disbursal records concerning
9 the \$800,000 settlement, and by failing to provide his clients an appropriate
10 accounting of the settlement funds once his clients demanded it, and by failing
11 to remit to his clients all money owed to them from the \$800,000 settlement
12 proceeds, Respondent violated RPC 1.14(b)(3) requiring a lawyer to maintain
13 complete records of all funds, securities, and other properties of a client
14 coming into possession of the lawyer and render appropriate accounts to his or
15 her client regarding them and RPC 1.14(b)(4) requiring a lawyer to promptly
16 pay or deliver to client as requested by a client the funds, securities, or other
17 properties in the possession of the lawyer which the client is entitled to receive
18 and subjects Respondent to discipline pursuant to ELC 1.1. Count VII is
19 proven. With respect to this conduct, Respondent acted knowingly.

20 **COUNT VIII**

21 79) By sharing with Wayne Perryman, a non-lawyer, part of the attorney's
22 fees from the settlement in the Jeffries lawsuit, Respondent violated RPC
23 5.4(a) prohibiting a lawyer from sharing legal fees with a non lawyer and
24 subjects Respondent to discipline pursuant to ELC 1.1. Count VIII is proven.
25 With respect to this conduct, Respondent acted intentionally.

26 **COUNT IX**

27 80) By instructing Wayne Perryman to create an hourly invoice for
28 Perryman's ten percent fee, Respondent violated RPC 8.4(c) stating that it is
29 professional misconduct for a lawyer to engage in conduct involving dishonest,
30 fraud, deceit or misrepresentation and subjects Respondent to discipline
31 pursuant to ELC 1.1. Count IX is proven. With respect to this conduct,
32 Respondent acted intentionally.

33 81) The Association dismissed that portion of Count IX that relates to
34 Respondent's failure to provide his clients the benefit of the \$10,000 discount
35 agreed to by Perryman.

36 82) The Association failed to prove the allegation that Respondent charged
37 his clients, as costs, for personal expenses.

38 **COUNT X**

39 83) The Association has failed to prove the alleged violations of the Rules of
40 Professional Conduct in Count X.

1 Additional paragraphs added to findings by Hearing Officer in the Amended
2 Findings of Fact:

3 (1) The Association failed to prove by a clear preponderance that
4 Respondent participated in making an aggregate settlement without obtaining
5 the informed consent of each plaintiff in the Jeffries lawsuit.

6 (2) The Association failed to prove by a clear preponderance that
7 Respondent held \$5,000 back from the settlement funds for which he never
8 accounted.

9 IV. APPLICATION OF ABA STANDARDS

10 The Washington State Supreme Court requires the Hearing Officer to apply
11 the American Bar Association's Standards for Imposing Lawyer Sanctions in
12 all lawyer discipline cases. Applying the ABA Standards involves a two-step
13 process. The first is to determine a presumptive sanction by considering (1) the
14 ethical duty violated; (2) the lawyer's mental state; and (3) the extent of the
15 actual or potential injury caused by the misconduct. The second is to consider
16 any aggravating or mitigating factors which might alter the presumptive
17 sanction.

18 ABA PRESUMPTIVE SANCTIONS

19 Count II

20 84) Applying the ABA Standards, the following presumptive sanction is
21 applicable to Respondent's conduct in filing an appeal against Local 98 in May
22 1998 without his clients' permission and continuing that appeal without
23 notifying the clients of its implications for them as individuals, and despite his
24 knowledge that certain of his clients no longer wished him to represent them,
25 and further failing to convey an offer of settlement from Local 98 which would
26 have ended the appeal against Local 98 and then suing his clients for their
27 refusal to continue the appeal:

ABA Standard 4.42(a) provides that "suspension is generally appropriate
when: a lawyer knowingly fails to perform services for a client and causes
injury or potential injury to a client. "

Count IV

85) Applying the ABA Standards, the following presumptive sanction is
applicable to Respondent's conduct in charging the plaintiffs for excessive
costs:

ABA Standard 4.12 provides that "suspension is generally appropriate when
a lawyer knows or should know that he is dealing improperly with client
property and causes injury or potential injury to a client."

Count V

86) Applying the ABA Standards, the following presumptive sanction is
applicable to Respondent's conduct in representing one or more of the

1 longshoremen without explaining to each of them the implications of the
2 common representation, and/or without explaining both the advantages and
3 risks involved, and by failing to obtain written waivers from one or more of the
4 longshoremen.

5 ABA Standard 4.32 provides that "suspension is generally appropriate when
6 a lawyer knows of a conflict of interest and does not fully disclose to a client
7 the possible effect of that conflict, and causes injury or potential injury to a
8 client.

9 Count VII

10 87) Applying the ABA Standards, the following presumptive sanction is
11 applicable to Respondent's conduct in failing to maintain complete receipt and
12 disbursal records and by failing to provide his clients an appropriate accounting
13 of the settlement funds once his clients demanded it, and/or by failing to remit
14 to the clients all money owed to them:

15 ABA Standard 4.12 provides that "suspension is generally appropriate when
16 a lawyer knows or should know that he is dealing improperly with client
17 property and causes injury or potential injury to a client."

18 Count VIII

19 88) Applying the ABA Standards, the following presumptive sanction is
20 applicable to Respondent's conduct in sharing with Wayne Perryman, a non-
21 lawyer, part of the attorney's fees from the settlement in the *Jeffries* lawsuit and
22 charging a contingent fee to the plaintiffs which was intended to conceal the
23 fee-splitting arrangement:

24 ABA Standard 7.1 provides that "disbarment is generally appropriate when
25 a lawyer knowingly engages in conduct that is a violation of a duty owed to the
26 profession with the intent to obtain a benefit for the lawyer or another, and
27 causes serious or potentially serious injury to a client, the public, or the legal
system."

Count IX

89) Applying the ABA Standards, the following presumptive sanction is
applicable to Respondent's conduct in instructing Wayne Perryman to create an
hourly invoice for Perryman's ten percent fee which was intended to conceal
the fee-splitting arrangement:

ABA Standard 7.1 provides that "disbarment is generally appropriate when a
lawyer knowingly engages in conduct that is a violation of a duty owed to the
profession with the intent to obtain a benefit for the lawyer or another, and
causes serious or potentially serious injury to a client, the public, or the legal
system."

1
2 AGGRAVATING AND MITIGATING FACTORS

3 90) The following aggravating factors contained in Section 9.22 of the ABA
4 Standards for Imposing Lawyer Sanctions are applicable in this case:

5 1) Substantial Experience in the Practice of Law:
6 Respondent has been practicing law in Washington State
7 since 1986.

8 2) Prior Disciplinary Offenses: Respondent received an
9 Admonition in 1989 for making a misrepresentation to the
10 Association and failing to cooperate with a WSBA
11 investigation. Respondent received a Reprimand in 1998 for
12 directing his staff to "emulate" the signatures of declarants
13 on two declarations and then knowingly filing those
14 declarations with the court.

15 3) Multiple Offenses: In this matter Respondent was found
16 to have violated the multiple provisions of the Rules of
17 Professional Conduct (RPC) in six separate counts involving
18 more than a dozen clients.

19 4) Refusal to acknowledge wrongful nature of conduct.
20 Respondent has denied any wrongdoing and has strenuously
21 argued that no misconduct occurred in this case.

22 5) Indifference to making restitution. Respondent has
23 declined to acknowledge or remedy the damages from his
24 misconduct and continues to argue that he does not owe his
25 clients any money. He has also argued that even where he
26 made "bookkeeping errors," there was no real harm done
27 because his clients owed him a larger percentage than they
paid him in any event.

91) None of the mitigating factors, which are set forth in Section 9.32 of the
ABA Standards for Imposing Lawyer Sanctions are applicable in this case.

92) The hearing officer finds that the aggravating factors outweigh the
mitigating factors and on balance these factors support a sanction of
suspension.

93) Respondent's behavior resulted in actual injury to all of the Jeffries
plaintiffs including Chambers, Chavez, Rhymes, and/or Walker.

1
2 V. SANCTION RECOMMENDATION

3 The Board recommends that Mr. Marshall be disbarred² and pay restitution in
4 the amount of \$50,473.75. This amount includes the \$41,000 wrongfully
5 retained and the \$9,473.75 wrongfully charged as fees. The Board recommends
6 that the Court order Respondent to pay this restitution within 60 days of entry
7 of the Court's order.

8 The Board finds that the presumptive sanction for Counts VIII and IX is
9 disbarment. Mr. Marshall knowingly agreed to share fees with Mr. Perryman
10 and then intentionally instructed Mr. Perryman to submit a false invoice to
11 conceal the fee-splitting arrangement. Mr. Marshall's conduct was intended to
12 benefit both himself and Mr. Perryman and caused injury to the clients and the
13 legal system. Mr. Marshall committed multiple offenses involving multiple
14 clients. The Hearing Officer found that no mitigating factors apply. The
15 appropriate sanction here is disbarment. Respondent cited cases to support his
16 argument that suspension was a disproportionately harsh sanction. The Office
17 of Disciplinary Counsel cited cases to support its argument that disbarment is a
18 proportionately appropriate sanction. The Board finds that disbarment is the
19 proportionately appropriate sanction.

20 Dated this ____ day of July, 2005

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Mike Spencer for the Majority

2 The vote on the sanction was 7-6. Those voting in favor of disbarment were Spencer, Fancher, Bothwell, Madden, Montez, Romas and Hollingsworth. Those opposing disbarment were: Friedman, Beale, Lee, McMonagle, Kurtz and Reed.

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2 V. SANCTION RECOMMENDATION

3 The Board recommends that Mr. Marshall be disbarred² and pay restitution in
4 the amount of \$50,473.75. This amount includes the \$41,000 wrongfully
5 retained and the \$9,473.75 wrongfully charged as fees. The Board recommends
6 that the Court order Respondent to pay this restitution within 60 days of entry
7 of the Court's order.

8 The Board finds that the presumptive sanction for Counts VIII and IX is
9 disbarment. Mr. Marshall knowingly agreed to share fees with Mr. Perryman
10 and then intentionally instructed Mr. Perryman to submit a false invoice to
11 conceal the fee-splitting arrangement. Mr. Marshall's conduct was intended to
12 benefit both himself and Mr. Perryman and caused injury to the clients and the
13 legal system. Mr. Marshall committed multiple offenses involving multiple
14 clients. The Hearing Officer found that no mitigating factors apply. The
15 appropriate sanction here is disbarment. Respondent cited cases to support his
16 argument that suspension was a disproportionately harsh sanction. The Office
17 of Disciplinary Counsel cited cases to support its argument that disbarment is a
18 proportionately appropriate sanction. The Board finds that disbarment is the
19 proportionately appropriate sanction.

20 Dated this 20 day of July, 2005

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Mike Spencer for the Majority

² The vote on the sanction was 7-6. Those voting in favor of disbarment were Spencer, Fancher, Bothwell, Madden, Montez, Romas and Hollingsworth. Those opposing disbarment were: Friedman, Beale, Lee, McMonagle, Kurtz and Reed.

Westlaw.

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Unpublished Disposition

(Cite as: 202 F.3d 278, 1999 WL 1062740 (9th Cir.(Wash.)))

Briefs and Other Related Documents

NOTICE: THIS IS AN UNPUBLISHED
 OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA9 Rule 36-3 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, Ninth Circuit.
 Bennie JEFFERIES, Kim C. Farrison Allen
 Webster, Robert K. Frazier, Douglas
 Woods, Michael Chambers, Rodney Rhymes, Mark
 Barnett, Terrell B. Rushing,
 Tracey Montgomery, Andrew A. Trinidad, Ruben
 T. Chavez, Allison D. Walker,
 Bruce Walker, Myron Woods, and John Does
 1-100, Plaintiffs-Appellants,

THE INTERNATIONAL LONGSHOREMEN'S
 AND WAREHOUSEMEN'S UNION, Locals 19,
 23, 52

and 98; Pacific Maritime Association; American
 President Lines, Ltd; Eagle
 Marine Services, Ltd; Maersk Incorporated, Nol,
 Incorporated (USA), Mitsui

O.S.K. Lines, Ltd; Ooci (USA), Incorporated;
 Hanjin Shipping Company, Ltd. Sea-
 Star Stevedore Company; (SSA); Marine
 Terminals, Corporation Kawasaki Kisen
 Kaisha, Ltd. (K-Line); Matson Navigation; Matson
 Terminals, Incorporated; Jones
 Stevedore, Incorporated, Defendants-Appellees.

No. 98-35534.

D.C. No. CV-96-6032-FDB.

Argued and Submitted Nov. 3, 1999.

Decided Nov. 22, 1999.

Appeal from the United States District Court for
 the Western District of Washington, Franklin D.
 Burgess, District Judge, Presiding.

Before RYMER, HAWKINS, and MCKEOWN,
 Circuit Judges.

MEMORANDUM [FN1]

FN1. This disposition is not appropriate
 for publication and may not be cited to or
 by the courts of this circuit except as may
 be provided by 9th Cir. R. 36-3.

****1** Appellants, fifteen African-American and
 Hispanic longshore workers based at the ports of
 Seattle and Tacoma appeal portions of the district
 court's order granting summary judgment on all
 claims against the International Longshoremen's and
 Warehousemen's Union, **Local 98** ("**Local 98**"),
 one of the union defendants in the district court
 action. Appellants limit their challenge to two
 issues: 1) whether the district court erred in granting
 summary judgment on their claims that **Local 98**
 discriminated on the basis of race in the registration
 of new members; and 2) whether the district court
 erred in granting summary judgment on their claims
 of a hostile work environment. As the facts are
 known to the parties, we need not set them forth
 here. We affirm in part and reverse in part.

As an initial matter, **Local 98**, citing *MacKay v. Pfeil*, 827 F.2d 540, 542 n. 2 (9th Cir.1987), contends that appellants' failure to challenge four related district court orders, three of which were entered after summary judgment was granted and one of which was a pretrial order lodged a day earlier, constitutes an abandonment of issues decided therein. This argument lack merit. *MacKay*, a case in which the appellant failed to challenge alternative grounds contained in the very order sought to be appealed, is inapposite. Accordingly,

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202 F.3d 278 (Table), 1999 WL 1062740 (9th Cir.(Wash.))
Unpublished Disposition

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we proceed to consider appellants' claims on their merits.

We review a grant of summary judgment de novo. *Margolis v. Ryan*, 140 F.3d 850, 852 (9th Cir.1998). Viewing the evidence in the light most favorable to the nonmoving party, we must determine whether any genuine issue of material fact exists and whether the district court correctly applied the law. *Id.*

We affirm the district court's grant of summary judgment in favor of **Local 98** on appellants' discrimination-in-registration claims. As appellants have failed to point to evidence raising a material issue of fact that they personally suffered race-based discrimination in registration or to establish **Local 98's** responsibility for the selection of foremen in the years in question, we affirm the district court's ruling.

With regard to appellants' hostile work environment claims, we affirm in part and reverse in part. The district court's grant of summary judgment is affirmed as to all appellants except Ruben Chavez, Tracey Montgomery, Douglas Woods, and Michael Chambers. Given the unique relationship alleged among **Local 98**, the supervisors, the employers, and the rank-and-file dockworkers; the evidence concerning a racially hostile work environment as to Chavez, Montgomery, Woods, and Chambers; and the evidence suggesting that the union was on notice of the hostile work environment, the record reveals that material issues of fact exist, thereby precluding summary judgment with respect to the aforementioned four appellants.

Local 98's request for attorneys' fees is denied.

AFFIRMED IN PART AND REVERSED IN PART. EACH PARTY TO PAY ITS OWN FEES ON APPEAL.

RYMER, Circuit Judge, concurring in part and dissenting in part.

RYMER, Circuit Judge.

****2** I would affirm summary judgment on both claims. Assuming that a racially hostile environment did exist on the waterfront, neither Chavez, Montgomery, Woods, nor Chambers was a member of **Local 98** and none complained (or for all that appears, had any right to complain) to **Local 98**. They did not (and probably could not) ask **Local 98** to file a grievance in their behalf. In these circumstances I do not see how **Local 98** had any duty that could run to these parties. To be sure, a union has an obligation to oppose employment discrimination against its members, and it may breach this duty by acquiescing or joining in an employer's discrimination practices that create a hostile workplace. And there is no doubt that a union can be liable for its own acts of racial harassment against its own members. See, e.g., *Woods v. Graphic Communications*, 925 F.2d 1195 (9th Cir.1991). However, I do not see how **Local 98** can be liable to non-members for acting, or failing to act, with respect to a hostile environment, even one to which its own members may have contributed. This is so even though **Local 98** members were at the same time direct supervisory employees of the employer; this simply made them agents of the employer when working. Thus, evidence that Gerrish and Miniken used racial epithets at work (and it is undisputed that the incidents occurred while each was working for an employer and not in any official union capacity), does not raise a triable issue about **Local 98's** responsibility for their language, no matter how deplorable.

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Briefs and Other Related Documents (Back to top)

• 98-35534 (Docket) (Jun. 02, 1998)

END OF DOCUMENT

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DECLARATION OF SERVICE

On said day below ABC Legal Messenger delivered a true and accurate copy of the following documents: Motion for Leave to Submit Over-Length Brief, and Brief of Appellant in No. 200, 302-8, to the following:

Scott Busby
Washington State Bar Association
2101 Fourth Avenue, Ste. 400
Seattle, WA 98121-2343

ORIGINALS FILED WITH:

Washington Supreme Court
Clerk's Office
Olympia, WA

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
05 DEC 12 PM 4:05
BY C. J. HARRITT
CLERK

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: December 12, 2005, at Tukwila, Washington.

Christine Jones
Christine Jones
Legal Assistant
Talmadge Law Group PLLC